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ABSTRACT

This monograph reviews the current status of constitutional, statutory, and case law governing public employers' obligations to assure equal employment opportunities and employees' rights to nondiscriminatory treatment. An initial overview of the legal framework discusses federal equal protection mandates including the guarantee of equal protection of the laws under the Fourteenth Amendment, the due process clause of the Fifth Amendment, and Title VII of the Civil Rights Act of 1964. Judicial criteria used to assess claims of employment discrimination are described. Subsequent sections summarize major judicial decisions interpreting these provisions in cases alleging employment discrimination based on race, sex, national origin, religion, handicap, or age. Topics of racial discrimination law addressed in detail are hiring and promotion practices, staff reductions, affirmative action, and reverse discrimination. Major concerns of the sex discrimination discussion are conditions of employment, pregnancy-related policies, compensation, retirement benefits, and sexual harassment. An additional chapter covers suit for compensatory and punitive damages for employment discrimination under 42 U.S.C., section 1983. Guidelines to help public employers reduce discrimination in employment decisions and avoid liability are provided in the conclusion. References are thoroughly documented. (MJL)

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DISCRIMINATION IN PUBLIC EMPLOYMENT

The Evolving Law

by

Martha M. McCarthy

National Organization on Legal Problems of Education

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Preface

Dr. Martha M. McCarthy is Professor of Educational Law and Associate Dean of the Faculties at Indiana University. Prior to joining the Indiana University faculty in 1975, she had been a classroom teacher, a university instructor and a central office administrator. Dr. McCarthy received her doctorate in Educational Administration from the University of Florida where her dissertation in school law received the Wiles Memorial Award for the outstanding dissertation in education. She has made numberous presentations regarding the legal rights and responsibilities of teachers, pupils and administrators, and has written extensively in the field of school law. Dr. McCarthy has directed or co-directed several externally funded educational projects, and currently serves as vice-president on the Board of Directors of NOLPE.

This monograph was commissioned and published by NOLPE as the result of a need for a comprehensive analysis of the complex subject of legal aspects of public employment discrimination. The scope of the monograph is vast as the author examines the legal framework of employment discrimination litigation and the specific facets of race, sex, handicap, religious, age and national origin discrimination. The author does not limit her research to case law but also examines constitutional and legislative mandates.

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Discrimination in Public Employment: The Evolving Law

Martha M. McCarthy

Public employment has not been immune to the societal problem of discrimination against various segments of our citizenry. Employment decisions regarding hiring, promotion, job assignment, and a host of other concerns have generated charges that individuals have been disadvantaged because of inherent traits rather than because of their qualifications and abilities.

This monograph presents an overview of the current status of the law governing public employees' rights to nondiscriminatory treatment and employers' obligations to assure equal opportunities. Constitutional and statutory mandates as well as judicial decisions interpreting these provisions are covered. Following a description of the legal framework, specific protections against discrimination based on race, sex, national origin, religion, handicaps, and age are addressed. While an attempt is made to distill the complicated legal issues involved in public employment discrimination and present them in nontechnical terms, all topics are thoroughly documented to facilitate using this monograph as a reference tool.

Legal Framework

Initially, public employment discrimination suits were brought under the federal constitutional guarantee of equal protection of the laws. To clarify individuals' protections against discrimination, federal and state civil rights legislation has been enacted during the past two decades. Most of the statutory suits pertaining to alleged employment discrimination have been initiated under Title VII of the Civil Rights Act of 1964 or under other federal laws modeled after Title VII, such as the Age Discrimination in Employment Act. A description of judicial criteria used to assess claims of employment discrimination under constitutional mandates and Title VII is provided in this section. These criteria are referred to often in addressing the legality of specific employment practices in subsequent sections of this monograph.

Federal Equal Protection Mandates

The fourteenth amendment to the Federal Constitution provided in part that states cannot deny their citizens equal protection of the laws. The due process clause of the fifth amendment has been interpreted as placing similar restrictions on Congress. Governmental action that facially discriminates against individuals on the basis of a suspect classification, such as race, national origin, or alienage, can be justified only with evidence that a compelling state interest is being served. Rarely have legislative bodies been able to produce a sufficiently compelling interest to justify the creation of a suspect class.[1] However, if legislation does not involve a suspect classification or affect a fundamental interest (*i.e.*, an explicit or implicit constitutional right), courts traditionally have required only that governmental classifications have a rational relationship to a legitimate goal, a standard most legislation can satisfy. This lenient rational basis test generally has been used to evaluate challenged governmental classifications based on traits such as age and handicaps.[2]

Dissatisfaction with having to choose between the stringent and lenient equal protection test has caused the Supreme Court to apply an intermediate standard in some recent cases where neither a suspect class nor a fundamental right are involved. This test requires that the challenged classification serve "important governmental objectives" and that the discriminatory means employed are "substantially related to the achievement of those objectives."[3] The Court has applied this middle tier standard in assessing contested sex-based classifications under the equal protection clause.

While equal protection mandates offer significant protections to citizens who are victims of invidious governmental discrimination, most allegations of discrimination in public employment do not involve *overt* classifications based on race, sex, or other inherent traits. Rather, suits usually involve claims that an individual has been treated less

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1. In Hirabayashi v. United States, 320 U.S. 81 (1943) the Supreme Court sustained a wartime restriction on citizens of Japanese descent as serving a sufficiently compelling governmental interest.

2. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977).

3. Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982). Although four justices on the Supreme Court indicated that sex should be considered a suspect classification in 1973, Frontiero v. Richardson, 411 U.S. 677 (1973), it seems unlikely that a majority of the Court will adopt this position in the near future.

favorably than others solely because of an inherent characteristic or that facially neutral employment policies adversely affect certain classes of employees. To establish a constitutional violation in such suits, aggrieved individuals must prove that they have been victims of *purposeful* governmental discrimination.[4] In 1979 the Supreme Court held that mere awareness of a policy's adverse impact on a protected class does not constitute proof of unlawful motive. The Court stated that a discriminatory purpose "implies that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[5] However, the Court also has recognized that the foreseeable discriminatory consequences of acts can be considered by courts in assessing intent, even though foreseeable consequences alone cannot substantiate unlawful motive.[6] In addition, the judiciary has noted that evidence of a pattern or practice of public employment discrimination can be used in conjunction with other evidence to substantiate a plaintiff's charge of discriminatory intent.[7]

Title VII of the Civil Rights Act of 1964

Because of the difficulty in proving discriminatory intent, plaintiffs recently have relied primarily on Title VII to challenge allegedly biased employment practices. Title VII prohibits employers with fifteen or more employees, employment agencies, and labor organizations from discriminating against employees on the basis of race, color, religion, sex, or national origin and covers hiring, promotion, and compensation practices as well as fringe benefits and other terms and conditions of employment.[8] The law allows employers to impose hiring restrictions based on sex, national origin, or religion (but not on race), if such characteristics are bona fide occupational qualifications.

Under Title VII, the claimant must meet certain procedural requirements in filing charges and must pursue appropriate state and federal administrative remedies before initiating a federal law suit. In 1982 the Supreme Court ruled that a claimant does not have a right to

4. *See* Washington v. Davis, 426 U.S. 229 (1976).
5. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
6. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979).
7. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Evans v. Harnett, 684 F.2d 304 (4th Cir. 1982); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).
8. 42 U.S.C. § 2000e *et seq.*

a federal trial on a Title VII claim if the issue already has been litigated in a state court under state anti-discrimination provisions.[9] However, an employee's right to a trial under Title VII is not foreclosed by prior submission of the claim to final arbitration under a nondiscrimination provision of a collective bargaining agreement.[10] Federal anti-discrimination mandates are public policy considerations which cannot be subjected to the bargaining process.

Assuming that a plaintiff satisfies the procedural requisites to file a Title VII suit, there remains the difficult substantive task of proving that specific employment practices have violated the act. The plaintiff has the burden of establishing an initial or prima facie case of discrimination. A prima facie case raises an inference of discrimination, which if unexplained, is "more likely than not based on the consideration of impermissible factors."[11] The judiciary often has been called on to interpret the nature of proof required to establish and rebut claims of unlawful discrimination under Title VII and to determine the appropriate remedy when Title VII violations have been substantiated.

Two legal theories have been developed for assessing the merits of claims of employment discrimination under Title VII. When plaintiffs assert that they received *discriminatory treatment* because of race, sex, national origin, or religion, proof of the employer's discriminatory motive is required, which is similar to the constitutional standard under the equal protection clause. When neutral policies with a *disparate impact* on protected groups are challenged, proof of discriminatory intent is not necessary. After a prima facie case of disparate impact is established, the burden shifts to the employer to prove that the policy is justified by a valid job necessity.

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9. Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982). Courts have relied on the doctrine of *res judicata* in holding that an individual cannot maintain a federal civil rights action when the claim has been reviewed by the state judiciary. This judicially-created doctrine "applies to repetitious suits involving the same cause of action" and "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948). In essence, it prohibits parties from relitigating an issue that has been tried by a court of competent jurisdiction. *See* Mitchell v. National Broadcasting Co., 553 F.2d 265, 268 (2d Cir. 1977). However, *res judicata* does not preclude an individual from pursuing independent claims under Title VII and other applicable state and federal statutes. *See* Stafford v. Muscogee Cty. Bd. of Educ., 688 F.2d 1383 (11th Cir. 1982).

10. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). *See also* Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 448 A.2d 487 (N.J. Super. Ct. App. Div. 1982).

11. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In a disparate impact case, a rational or legitimate nondiscriminatory reason for the employment policy is insufficient to rebut an inference of discrimination; the policy must have a manifest relationship to the job. In 1971 the Supreme Court declared that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[12] Assuming that the employer satisifes the burden of demonstrating a compelling business necessity for the discriminatory practice, the plaintiff might still prevail by showing that the employer's legitimate interests can be served through less discriminatory means.[13]

The criteria for establishing a Title VII violation in a disparate treatment claim differ substantially from those in a disparate impact case. To substantiate a prima facie case of disparate treatment in connection with hiring and promotion practices, the plaintiff must first demonstrate membership in a group protected by Title VII. Then, the individual must show that he or she applied for and was qualified to assume the job sought and was rejected despite such qualifications. The individual must also produce evidence that the position remained open after the rejection and that the employer continued to seek applicants of the plaintiff's qualifications.[14]

Once a prima facie case of disparate treatment is established, the employer can rebut the inference of discrimination by articulating a nondiscriminatory reason for the action. If the employer is successful in producing such a nondiscriminatory reason, the plaintiff then must prove that the asserted legitimate reason was a mere pretext for discrimination. The Supreme Court has recognized that the employer is not required to accord preference to minorities and women among equally qualified applicants or to persuade the judiciary that it had convicing, objective reasons for selecting a certain applicant. Instead, the employer bears only the burden of explaining clearly and specifically the nondiscriminatory reasons for the action.[15] The burden of persuasion remains with the plaintiff to prove intentional discrimination by a preponderance of evidence. In 1982 the Supreme

12. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See also* Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981).

13. *See* Dochard v. Rawlinson, 433 U.S. 321, 329 (1977).

14. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). These criteria have been adapted to assess other types of alleged differential treatment in employment.

15. *See* Texas Dep't of Commun. Affairs v. Burdine, 450 U.S. 248, 258-59 (1981); Lee v. Washington Cty. Bd. of Educ., 625 F.2d 1235 (5th Cir. 1980).

Court declared that discriminatory intent means actual motive and is not a legal presumption to be drawn from a factual showing of something less than motive.[16]

Because it is more difficult to prove discrimination involving disparate treatment than disparate impact, the court's assessment of the nature of the charge presented is often important in determining the outcome of the case. Yet, the distinction between the two types of discrimination is not always clear. There are differences of opinion among Supreme Court justices[17] and among lower federal courts[18] regarding what constitutes disparate treatment in contrast to disparate impact. Moreover, legal principles pertaining to the burden of proof issue in disparate treatment cases are still evolving. For example, in a recent education case involving disparate treatment, the Fourth Circuit Court of Appeals noted that the "shifting of the burden of persuasion to the defendant is proper in certain circumstances."[19] The court reasoned that among conditions warranting this shift "is a finding of either intentional segregative action or a recent history of racial discrimination in a school system."[20] Also, the Eleventh Circuit Court of Appeals recently reasoned that where a prima facie case of discriminatory treatment is established by "direct" rather than "circumstantical" evidence, an employer cannot refute such evidence simply by articulating a nondiscriminatory reason for the employment action.[21] If established that unconstitutional intent is a significant or substantial factor in an employment decision, the defendant must prove by overwhelming evidence that the same decision would have been reached absent the discriminatory reason.

Once an employee is successful in establishing that an employer has violated Title VII, the judiciary may enjoin the discriminatory practice and order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees,

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16. Pullman-Standard v. Swint, 102 S. Ct. 1781, 1790-1791 (1982).
17. *See* Connecticut v. Teal, 102 S. Ct. 2525 (1982) (majority and dissenting opinions).
18. *Compare* Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835, 839-42 (10th Cir. 1981), *with* Wilkins v. University of Houston, 654 F.2d 388, 394-405 (5th Cir. 1981). *See also* Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982).
19. Evans v. Harnett, 684 F.2d 304, 307 (4th Cir. 1982).
20. *Id.* at 307.
21. Lee v. Russell Cty. Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982). The court relied on Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), in which the Supreme Court recognized that if a protected right is a substantial factor in a dismissal decision, the school board must prove by a preponderance of evidence that the teacher would have been dismissed for other legitimate reasons.

with or without back pay . . . or any other equitable relief as the court deems appropriate."[22] The prevailing party in Title VII suits also can be awarded reasonable attorneys' fees. Although a few courts have awarded compensatory damages for pain and suffering, in general the judiciary has ruled that equitable relief under Title VII does not include the award of compensatory damages.[23] Also, punitive damages have not been allowed under Title VII. The judiciary has reasoned that Title VII was not intended to punish employers, but rather to assure equal employment opportunities.[24]

22. 42 U.S.C. § 2000e-5(g). In a few cases, successful plaintiffs have been awarded front pay (the difference between current earnings and the amount that could be earned if immediately hired or promoted into the position sought) instead of reinstatement where incumbent workers would have to be displaced. Such relief would continue until the position becomes available.

23. *See* Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1978); Adler v. John Carroll University, 549 F. Supp. 652 (N.D. Ohio 1982).

24. *See* Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982); Harrington, *id.* at 194-97.

Racial Discrimination

The criteria discussed in the preceding section have been applied to a variety of claims of racial discrimination in public employment. The majority of the cases have involved hiring and promotion practices and staff reductions. Also, the operation of affirmative action programs has resulted in claims of discrimination against the racial majority, or so called "reverse discrimination."

Hiring and Promotion Practices

Many controversies involving hiring practices have focused on prerequisites to employment, primarily the use of examinations that eliminate a disproportionate percentage of minorities from the applicant pool. Constitutional challenges to such practices have been rejected in the absence of evidence of discriminatory motive. For example, in 1976 the Supreme Court endorsed the use of a written skills test as an entrance requirement for the Washington, D.C. police training program, even though the test had a disparate adverse impact on black applicants.[25] Finding no intentional discrimination, the Court held that the practice did not violate the equal protection component of the fifth amendment.

More recently, the Supreme Court affirmed a lower court's conclusion that a state's use of the National Teachers Examination for teacher certification and salary purposes satisfied fourteenth amendment equal protection violation guarantees since the test was used for a legitimate purpose of improving the effectiveness of the state's teaching force and was not administered with any intent to discriminate against minority applicants for teacher certification.[26] The trial court was satisfied that the test was valid in that it measured knowledge of course content in teacher preparation programs. The court further reasoned that there was sufficient evidence to establish a relationship between the use of the test scores as a factor in determining teachers' placement on the pay

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25. Washington v. Davis, 426 U.S. 229 (1976). Prior to this decision, several federal appellate courts had found a constitutional violation because tests used as a prerequisite to public employment had a disparate impact on minorities and had not been properly validated as predicting success in the particular jobs for which they were used. *See* Walston v. County School Bd. of Nansemond Cty., Va., 492 F.2d 919 (4th Cir. 1974); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Armstead v. Starkville Mun. Sep. School Dist., 461 F.2d 276 (5th Cir. 1972).

26. National Educ. Ass'n v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd* 434 U.S. 1026 (1978).

scale and legitimate employment objectives such as encouraging teachers to upgrade their skills.

While the requisite proof of unlawful intent has posed a barrier for employees in constitutional cases, plaintiffs have been more successful in proving a Title VII violation in connection with facially neutral prerequisites to employment with a disparate impact on minorities. In *Griggs v. Duke Power Company*, the Supreme Court invalidated the use of a test of general intelligence as a prerequisite to employment because the requirement disproportionately eliminated minority applicants in violation of Title VII.[27] In this 1971 case, the Court did not prohibit the use of tests per se, but concluded that the employer must substantiate that tests used as a condition of employment are related to job performance in order to satisfy Title VII. In a subsequent case, the Court elaborated on the job-related requirement. It held that tests must be validated for the specific jobs for which they are used and that supervisors must apply clear job performance criteria in validating the tests.[28]

In a significant 1982 decision, the Supreme Court ruled five-to-four that prerequisites to employment or promotion with a disparate adverse impact on minorities violate Title VII even though the "bottom line" of the hiring or promotion process results in an appropriate racial balance.[29] The controversey focused on the required passage of an examination for job promotion in a Connecticut state agency. The trial court found that despite the disparate negative impact of the test requirement on minorities, the overall result of the hiring process did not reflect such an adverse impact. Thus, the district court concluded that the employer was not required to demonstrate that the test was job-related. Disagreeing, the Second Circuit Court of Appeals and subsequently Supreme Court reasoned that the "bottom line" makeup of the work force is immaterial in a disparate impact case. While acknowledging that evidence of a nondiscriminatory work force might in some instances assist an employer in rebutting a charge of unconstitutional motive, the Supreme Court majority reasoned that where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents

27. 402 U.S. 424 (1971). Guidelines of the Equal Employment Opportunity Commission stipulate that a selection rate for any group protected by Title VII that is less than 80 percent of the highest group's rate will generally be regarded as evidence of adverse impact.

28. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

29. Connecticut v. Teal, 102 S. Ct. 2525 (1982).

them from proceeding to the next step in the selection process," that barrier must be shown to be job-related to satisfy Title VII.[30] The majority declared that Congress did not intend "to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."[31]

However, the employer's burden of establishing a job necessity for policies with a disparate adverse impact is not impossible to satisfy. In 1981 the Fourth Circuit Court of Appeals found no Title VII violation in connection with a school district's use of certification grades based on scores on the National Teachers Examination to determine teachers' salaries.[32] Although the certification grades resulted in the denial of pay raises to a much larger proportion of black than white teachers, the appellate court reasoned that the practice was justified by the job necessity of attracting well qualified teachers and encouraging self-improvement among low-rated instructional personnel. As discussed previously, this practice had already withstood constitutional challenge because intentional discrimination was not established.

In addition to alleged discriminatory prerequisites to employment, individuals often have challenged hiring, promotion, and other employment decisions as racially motivated. Such discrimination charges have been particularly troublesome for the judiciary because of the subjective judgments involved in the hiring and promotion process. Courts have been reluctant to strip employers of their prerogatives to base decisions on personality and other subjective factors. However, the judiciary also has recognized that "greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria" because of the potential for masking racial discrimination.[33]

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30. *Id.* at 2530, *citing* 645 F.2d 138 (2d Cir. 1981).

31. *Id.*, 102 S. Ct. at 2535. A strong dissent, written by Justice Powell and joined by Justices Burger, Rehnquist, and O'Connor, asserted that there was *no* disparate impact since the employer had taken precautions to assure that appropriate numbers of minorities were promoted. Contending that the majority confused disparate impact and disparate treatment, Powell argued that a claim of discriminatory impact cannot be based on how "an individual is treated in isolation from the treatment of other members of the group." He further asserted that "employers need not develop tests that accurately reflect the skills of every individual candidate; there are few if any tests that do so," *id* at 2539 (Powell, J., dissenting). He contended that the analytical approach of the majority "takes a long and unhappy step in the direction of confusion," *id.*

32. Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).

33. Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975). *See also* Royal v. Missouri Highway and Transportation Comm'n, 655 F.2d 159, 164 (8th Cir. 1981); Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

Courts have accepted employers asserted nondiscriminatory reasons for denying employment or promotion to minorities and for other differential treatment if the individuals have not been qualified for the positions sought or if the decisions have been based on quality of performance or other considerations unrelated to race.[34] However, plaintiffs have gained relief with evidence that the avowed nondiscriminatory reason was merely pretextual to mask a discriminatory motive. For example, a black employee established a prima facie case of discrimination by establishing that a school district paid him less than his white counterpart for substantially equivalent work. The school board argued that the pay differential was based on nondiscriminatory reasons related to differences in performance and job responsibilities. But the appeals court concluded from the testimony that the differential was based primarily on racial considerations.[35]

Statistical evidence often plays an important role in establishing a prima facie case of racial bias in connection with hiring practices. An inference of disparate treatment can be established by evidence of gross statistical disparities between an employer's work force and the availability pool,[36] but courts have been cautious in relying on statistical evidence in disparate treatment cases. The Supreme Court has recognized that while statistical disparities can infer a pattern or practice of employment discrimination, courts should move with

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34. *See* Lewis v. Central Piedmont Commun. College, 689 F.2d 1207 (4th Cir. 1982) (white applicant was better qualified than black applicant who was rejected); Johnson v. Michigan State Univ., 547 F. Supp. 429 (W.D. Mich. 1982) (denial of promotion and tenure to minority professor was based on poor performance); Lee v. Ozark City Bd. of Educ., 517 F. Supp. 686 (M.D. Ala. 1981) (nonrenewal of minority coach's contract was justified by legitimate objectives of athletic program); Adams v. Gaudet, 515 F. Supp. 1086 (W.D. La. 1981) (rejection of minority applicant was justified by reliance on employment criteria established by state department of education); Fusi v. West Allis Public Schools, 514 F. Supp. 627 (E.D. Wis. 1981) (minority teacher lacked proper certification). In 1981 the Fifth Circuit Court of Appeals remanded a case for a determination of whether a black teacher whose contract was not renewed for lack of proper certification was treated differently than similarly situated white teachers who were retained because they were progressing toward certification, Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950 (5th Cir. 1981).

35. Pittman v. Hattiesburg Mun. Sep. School Dist., 644 F.2d 1071 (5th Cir. 1981). *See also* Lincoln v. Board of Regents of Univ. Sys. of Ga., 697 F.2d 928 (11th Cir. 1983), in which a white professor established that she would have received a new contract, "but for" her race.

36. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), where the Supreme Court found that the gross statistical disparities between the racial composition of the school district's teaching staff and the composition of the relevant labor market established a prima facie case of racial discrimination. *See also* Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981).

circumspection in evaluating statistics because their usefulness is contingent on each individual set of circumstances. In 1977 the Court noted that proof of "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" cannot establish that discrimination is a standard operating procedure.[37] More recently, the Fifth Circuit Court of Appeals compared the "complex and arduous" task involved in sound statistical analyses to the task of "arriving at a correct diagnosis of a disease," noting that "the day is long past . . . when we proceed with any confidence toward broad conclusions from crude and incomplete statistics."[38]

Despite these cautions, courts have considered statistical evidence in assessing employment discrimination claims. In 1982 the Fourth Circuit Court of Appeals found a pattern of racial discrimination in a school district based on statistical evidence that black principals were placed primarily in schools which formerly had predominantly black student bodies.[39] The court reasoned that this pattern of racial bias warranted shifting the burden of proof to school authorities to rebut the discrimination charge. The Tenth Circuit Court of Appeals also found that statistical evidence showing a concentration of black teachers in schools with a large proportion of black students and black principals was sufficient to establish a prima facie case of racial discrimination.[40] Moreover, the court concluded that the class action suit, alleging employment opportunities for minorities were restricted to a few schools, was misanalyzed by the federal district court as a disparate treatment rather than disparate impact case. The trial court had dismissed the claim, reasoning that the school district had articulated a legitimate nondiscriminatory reason for its hiring system which vests almost complete discretion in the school principal. However, the appellate court remanded the case, instructing the trial court to apply the more exacting "business necessity" standard. The appeals court noted that the judiciary has been particularly concerned about the justification for hiring and promotion procedures that rely heavily on subjective determinations.

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37. International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977). *See also* Castaneda v. Partida, 430 U.S. 482 (1977); Hazelwood, *id.*

38. Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981).

39. Evans v. Harnett, 684 F.2d 304 (4th Cir. 1982).

40. Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981). *But see* Price v. Denison Indep. School Dist., 694 F.2d 334 (5th Cir. 1982), in which the Fifth Circuit Court of Appeals concluded that the district court used erroneous statistical measures that compared the racial composition of principals with that of student bodies in establishing a prima facie case of discrimination under the equal protection clause.

Since legal proceedings in discrimination suits often are quite lengthy, some employers charged with discrimination in hiring have attempted to reduce their potential liability by remedying the alleged discriminatory practice before judically ordered to do so. In 1982 the Supreme Court ruled that an employer can toll the continuing accrual of back pay liability under Title VII by unconditionally offering the claimant the job previously denied without the promise of retroactive seniority.[41] The Supreme Court majority concluded that without such an opportunity to reduce back pay liability, employers have no incentive to end discrimination through voluntary efforts when they have been accused of a discriminatory practice. If the employer must offer retroactive seniority to the Title VII claimant, such an individual becomes more costly to hire than another applicant for the same job. Moreover, the majority reasoned that such action would have implications for collective bargaining agreements and employee morale in that claimants would be inserted in the seniority system over incumbents already on the job. Declaring that Title VII does not entitle the claimant to be "catapulted" into a better position simply because of alleged discrimination, the majority stated that the principle urged by the Equal Employment Opportunity Commission (EEOC) would have the "perverse result of requiring the employer in effect to insure [the] claimant against the risk that the employer might win at trial."[42] Of course, if the employee ultimately wins a favorable judicial ruling, the court may award full compensation, including retroactive seniority.

Staff Reductions

Public employers increasingly have been faced with the necessity of laying off personnel, and some of these reduction in force decisions have been challenged as disadvantaging minority employees. For example, allegations of racial discrimination often have accompanied school districts' efforts to reduce staff in connection with court-ordered desegregation plans. In 1969 the Fifth Circuit Court of Appeals announced in *Singleton v. Jackson Municipal Separate School District that* that school boards must develop objective, nondiscriminatory criteria

41. Ford Motor Co. v. Equal Employment Opportunity Comm'n, 102 S. Ct. 3057 (1982). Although this case involved alleged sex discrimination, the principle announced by the Court is applicable to charges of discrimination in hiring practices against other groups protected by Title VII.

42. *Id.* at 3067, 3069.

before making any staff reductions when converting from dual school systems to a unitary system.[43] The court further held that displaced personnel must be given preference in filling vacancies that occur as long as the individuals possess the minimum qualifications for the vacant positions.

During the 1970s, courts often were called on to apply the *Singleton* criteria in assessing the legality of staff reduction activity in school districts under desegregation orders. This litigation was concentrated in the Fifth Federal Circuit, where the bulk of court-ordered desegregation activity was taking place. Federal district courts and the Fifth Circuit Court of Appeals overturned several dismissals of black teachers and administrators where school boards had not applied preestablished objective criteria in making the decisions.[44] However, the number of cases initiated under the *Singleton* criteria has declined in recent years because many school districts have established unitary systems to the federal judiciary's satisfaction and thus are exempt from the *Singleton* rule. In the last two years, few plaintiffs have been successful in relying on *Singleton* to obtain relief for their dismissals.[45]

Most current controversies focus on reduction in force caused by financial exigencies rather than by desegregation. It has become common practice for public employers to use seniority as the primary criterion for determining which staff members will be released when personnel must be reduced. Title VII specifically allows employers to differentiate among employees based on seniority as long as intentional discrimination is not involved:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.[46]

Since minority employees often have less seniority, resulting in part from past discriminatory hiring practices, they are disproportionately

43. 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

44. *See* Ward v. Kelly, 515 F.2d 908 (5th Cir. 1975); United States v. Coffeeville Consol. School Dist., 513 F.2d 244 (5th Cir. 1975); Wright v. Houston Indep. School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975).

45. *See* MacDonald v. Ferguson Reorganized School Dist., 530 F. Supp. 469 (E.D. Mo. 1982); United States v. South Park Indep. School Dist., 491 F. Supp. 1177 (E.D. Tex. 1980); THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele ed.) at 31; *id.* YEARBOOK 1982 at 37.

46. 42 U.S.C. § 2000e2(h).

affected by staff reductions based on "last hired, first fired." Thus, the judiciary has recognized that under Title VII minority employees may be awarded retroactive or "constructive" seniority in situations where intentional racial bias has existed. Courts have ordered such modifications in seniority systems to reflect the "rightful place" of minority employees who have been the victims of prior discrimination.[47]

However, in 1982 the Supreme Court refused to make bona fide seniority systems adopted *after* the enactment of Title VII subject to disparate impact suits.[48] The Fourth Circuit Court of Appeals had concluded that post-act systems with a disparate impact on minorities were vulnerable under Title VII regardless of the motivation for adopting the programs. Reversing the appellate court's ruling, the Supreme Court ruled five-to-four that plaintiffs must establish discriminatory intent in order to successfully challenge a seniority system under Title VII, even though the scheme was established after the effective date of the act (1965). Thus, seniority systems with an adverse impact, regardless of when the plans were established, can satisfy Title VII unless there is evidence of discriminatory motive.

Affirmative Action Programs and Charges of Reverse Discrimination

The term "affirmative action" first was used in an Executive Order, issued by President Kennedy in 1961, to refer to a duty placed on employers to take steps to remedy past discrimination. The concept of affirmative action was reiterated in subsequent presidential orders forbidding racial discrimination in federally-contracted projects.[49] There is some sentiment that without affirmative action plans, including goals to increase the representation of women and minorities in the work force, the effects of past discriminatory practices cannot be eliminated. Yet, affirmative action goals, which are often stated in terms of hiring percentages, have been criticized as causing "reverse discrimination" or discrimination against the majority. Although affirmative action programs are directed toward women, the handicapped, and certain categories of veterans as well as toward racial and

47. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

48. American Tobacco Co. v. Patterson, 102 S. Ct. 1534 (1982). *See also* Pullman-Standard, Inc. v. Swint, 102 S. Ct. 1781 (1982).

49. For a discussion of the presidential orders, *see* SCHOOL LAW FOR A NEW DECADE (M.A. McGhehey ed. 1980) at 209-211.

ethnic minorities, most of the suits challenging such programs have focused on the preferential treatment of racial minorities.

In the much-publicized case, *Regents of the University of California v. Bakke*, the Supreme Court invalidated the admissions practices of the University of California at Davis because a rigid quota system was used to guarantee a certain number of minorities in each entering class.[50] Acknowledging that race can be among the considerations in admissions decisions, the majority found that the use of a separate system for minority applicants, in the absence of a history of discrimination, constituted impermissible bias against white applicants who might have higher qualifications than the minorities accepted in the "reserved" slots.

However, *Bakke* did not resolve the legality of various types of affirmative action programs in employment. Can court-ordered desegregation plans contain hiring quotas for minorities? Can employers voluntarily institute preferential employment practices for minorities and other protected groups if past discrimination has not been judicially acknowledged? These and related questions have generated substantial controversy, and to date only partial answers have been provided by the courts.

Several courts have upheld the constitutionality of affirmative action plans in connection with a finding of de jure segregation. For example, in 1982 the First Circuit Court of Appeals upheld an affirmative action plan as part of a desegregation order in the Boston school district, and the United States Supreme Court declined to review the case.[51] Under the plan, minorities must maintain 20 percent of the teaching positions regardless of their seniority. The court reasoned that without such a plan, the efforts made in remedying intentional discrimination in the school district would be eradicated through layoffs necessitated by declining enrollments.

A few years earlier the Connecticut federal district court issued a sweeping remedial order including hiring quotas to compensate for the discriminatory use of an examination in screening applicants for

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50. 438 U.S. 265 (1978). The majority based its decision on an interpretation of Title VI of the Civil Rights Act of 1964 which bars the exclusion of a person on the basis of race from a program or activity receiving federal funds.

51. Boston Teachers' Union v. Boston School Comm., 671 F.2d 23 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 62 (1982). *See also* Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982); Morgan v. McDonough, 689 F.2d 265 (1st Cir. 1982); Oliver v. Kalamazoo Bd. of Educ., 498 F. Supp. 732 (W.D. Mich. 1980), *stay denied*, 548 F. Supp. 646 (W.D. Mich. 1982).

positions in the Bridgeport Fire Department.[52] In addition to enjoining use of the test, the court ordered the city to hire all blacks and hispanics who had filed applications to take the 1975 examination and met other requirements for employment. The court further ordered that only nonwhites would be hired until reaching parity with the number of whites hired since 1975. However, on appeal, the Second Circuit Court of Appeals vacated the order and remanded the case with instructions for the lower court to justify its hiring order, given that minorities constituted only slightly over ten percent of those who took the test. The court also was instructed to consider the city's offer to lower the passing grade on the test.

A current controversy involves an affirmative action plan covering Boston police officers and fire fighters. The plan, ordered by a federal district court judge to remedy past discrimination, originally addressed only hiring practices and was silent regarding personnel lay offs. However, the court modified its plan after budgetary restrictions caused the departments to develop a program of massive staff reductions. Under the modified plan, blacks and hispanics are allowed to retain their jobs, while whites with more seniority are released. The First Circuit Court of Appeals upheld the plan, and the Supreme Court has agreed to review the case.[53] The Justice Department has submitted a brief in support of the white plaintiffs, asserting that bona fide seniority systems cannot be disregarded to protect minority workers who were hired under affirmative action plans.

More controversial than court-ordered affirmative action plans have been voluntary efforts of employers to give preference to minorities in the absence of a finding of unlawful discrimination. In 1979 the Supreme Court ruled that although a company was not obligated to accord such racial preference, neither was it barred from instituting a bona fide affirmative action plan to eliminate the lingering effects of prior racial bias.[54] Also, the Supreme Court declined to review a decision in which the Sixth Circuit Court of Appeals upheld a voluntary affirmative action plan for the Detroit Police Force under Title VII.[55]

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52. Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751 (D. Conn. 1978), *vacated and remanded*, 594 F.2d 306 (2d Cir. 1979).

53. Beecher v. Boston Chapter of NAACP, 679 F.2d 965 (1st Cir. 1982), *review granted*, 103 S. Ct. 293 (1982).

54. Kaiser Aluminum and Chemical Corp. v. Weber, 443 U.S. 193 (1979).

55. Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). While suggesting criteria for assessing whether voluntary affirmative action plans satisfy the equal protection clause, the appeals court vacated its decision on Title VII and remanded the constitutional issue for additional proceedings. *See also* Fullilove v. Klutznick, 448 U.S. 448, 510-11 (Powell, J., concurring).

The appellate court noted that discriminatory acts which might not result in legal liability can nonetheless justify a voluntary affirmative action plan. The court reasoned that Title VII does not prohibit race-conscious action to eliminate discrimination, even if the plans involve the use of quotas.

In the educational context, several voluntary affirmative plans also have received judicial endorsement. For example, in 1979 the Ninth Circuit Court of Appeals upheld an affirmative action plan requiring the racial and ethnic makeup of the students in the Los Angeles School District to be reflected in the faculty composition of all schools.[56] Acknowledging that there was no finding of de jure segregation in the school system, the court held that the school board was not precluded from taking voluntary action to improve the racial balance among its teaching personnel in order to enhance educational opportunities for students.

More recently, a federal district court rejected constitutional and statutory challenges to a Michigan school district's collective bargaining agreement that protected black teachers from layoffs.[57] Noting that teachers provide important role models for students, the court reasoned that it was appropriate to compare the proportion of minority teachers to the percentage of minority students in the district (rather than to relevant workforce data) in developing affirmative action goals. Although there was no evidence of past intentional discrimination, the court concluded that the "chronic" and "substantial" underrepresentation of minority teachers in the school district justified the bargaining agreement. The court recognized that the plan satisfied constitutional and statutory mandates because it was temporary, did not require the retention of unqualified teachers, and did not result in "ousting" white teachers and replacing them with minorities.

However, in January 1983, a Pennsylvania federal district court struck down the use of a quota system to maintain, not merely achieve, racially balanced faculties in Philadelphia schools.[58] Noting that the

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56. Zaslawsky v. Board of Educ. of Los Angeles, 610 F.2d 661 (9th Cir. 1979). *See also* Caulfield v. Board of Educ. of N.Y.C., 583 F.2d 605 (2d Cir. 1978).

57. Wygant v. Jackson Bd. of Educ., 456 F. Supp. 1195 (E.D. Mich. 1982). *See also* Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981).

58. Kromnick v. School Dist. of Philadelphia, 555 F. Supp. 249 (E.D. Pa. 1983). *See also* Chance v. Board of Examiners and Board of Educ. of N.Y.C., 534 F.2d 993 (2d Cir. 1976), in which the appeals court ruled that a school district could not superimpose a racial quota on a bona fide seniority system for reducing personnel in the absence of finding of intentional discrimination in the district's staff reduction practices.

quota system previously was justified as a remedial device to desegregate school staffs, the court concluded that the school district violated the equal protection clause and Title VII by retaining the personnel quota system after its schools were successfully integrated. The court rejected the school district's assertion that continued use of quotas is necessary to advance the important governmental objective of maintaining racially balanced school staffs. The court found no evidence indicating that without the quota system the district would revert to prior segregation or that other nondiscriminatory alternatives could not be used to ensure integrated faculties. Finding the quota system "permanent," rather than temporary, the court ordered the school district to explore other means to maintain existing levels of faculty integration.

In addition to affirmative action plans pertaining to employees, affirmative action requirements in connection with public employers' authority to use outside contractors for construction projects have generated litigation. In some instances, contractors have been required to submit evidence that a certain percentage of the business will be subcontracted to minority enterprises, and these stipulations have evoked conflicting judicial rulings. Some courts have found that such requirements discriminate against nonminority businesses, while other courts have upheld this type of preferential treatment as long as the policies conform to state law and are narrowly designed to remedy the effects of prior discrimination.[59]

Claims that affirmative action programs result in reverse discrimination are complex and do not lend themselves to simplistic resolution. The law in this domain is still evolving, but some conclusions can be drawn from litigation to date. For example, courts can impose racial quotas in connection with hiring and staff reduction practices as part of remedial decrees. Employers also may use numerical goals in voluntary affirmative action programs if the programs are temporary, do not foreclose employment opportunities for nonminorities, and include waiver provisions in the event that the goals are not attained. However, such programs must be designed to remedy the effects of discriminatory acts. While the precise evidence necessary to substantiate prior discrimination remains unclear, this required "admission of guilt" may deter some public employers from instituting voluntary affirmative action plans.

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59. Associated General Contractors v. San Francisco Unified School Dist., 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 441 U.S. 1061 (1980); Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981). *Compare with* Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981). In 1980 the Supreme Court upheld the

Sex Discrimination

Differential treatment of the sexes has a lengthy history and only within the past few decades has such discrimination been legally challenged. Traditionally, distinctions based on gender were rationalized by an attitude of "romantic paternalism," which the Supreme Court characterized in 1972 as placing women "not on a pedestal but in a cage."[60] Until the 1970s, unequal treatment of male and female employees was not only prevalent, but also judicially sanctioned.

During the past decade, courts have recognized that the fourteenth amendment prohibits state-imposed invidious discrimination based on sex as well as on other inherent traits. Although gender classifications do not trigger strict scrutiny equal protection review as do racial classifications, the judiciary recently has used the intermediate equal protection test to invalidate state action that facially discriminates on the basis of sex. For example, in a five-to-four decision in 1982, the Supreme Court struck down a policy of a state-supported university, limiting enrollment in its nursing school to women.[61] Noting that the policy was not substantially related to important governmental objectives, the Court majority declared that there must be "an exceedingly persuasive justification" for such classifications. The majority rejected the contention that the single-sex admission policy was a justifiable affirmative action effort to compensate for past discrimination against women, finding instead that the policy "tends to perpetuate the stereotyped view of nursing as an exclusively women's job."[62]

While discriminatory sex-based classifications have been struck down under the intermediate equal protection standard, the mere disparate impact of a facially neutral law on men or women is not sufficient to violate equal protection guarantees. To illustrate, in 1979 the Supreme Court ruled that the Massachusetts Veterans Preference

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"minority business enterprise" (MBE) section of the Public Works Employment Act of 1977 which requires, absent an administrative waiver, that at least 10% of federal funds granted for local public works projects be used to procure services or supplies from minority businesses. Finding no violation of the equal protection component of the fifth amendment, the Court noted that the MBE program is a valid means to remedy the effects of prior racial discrimination. The Court reasoned that the program's use of racial and ethnic criteria are narrowly limited to accomplishing Congress' remedial objectives. Fullilove v. Klutznick, 448 U.S. 448 (1980).

60. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

61. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

62. *Id.* at 3339.

Statute, which has a disparate impact on women, satisfies the equal protection clause.[63] The statute, giving absolute preference to veterans (98% are males) in civil service positions, was found to be gender neutral because it classifies on veteran status and not on sex. Recognizing that the adverse impact of the law on women was foreseeable when the statute was written, the Court nonetheless concluded that the legislature did not *intentionally* attempt to exclude women from civil service positions. In the absence of discriminatory motive, the Court found no violation of the equal protection clause.

As with claims of racial discrimination, the difficult burden of establishing unconstitutional motive has caused most plaintiffs in sex bias suits to rely on federal statutory guarantees. Specifically, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and Title IX of the Education Amendments of 1972 have been the basis for most claims. A range of employment concerns has generated statutory sex bias suits, including conditions of employment, pregnancy-related policies, compensation practices, retirement benefits programs, and sexual harassment.

Conditions of Employment

Charges of sex bias in hiring, promotion, job assignment, and other conditions of employment generally have been initiated under Title VII. As mentioned previously, employers can defend a facially discriminatory hiring policy under Title VII with proof that gender is a bona fide occupational qualification (BFOQ) necessary to the normal operation of the business. While this type of sex discrimination is not usually an issue in public employment, the BFOQ exception to Title VII has generated some litigation. For example, in 1971 the Supreme Court ruled that an employer could not deny employment to women with preschool-age children while hiring men with such children without establishing that the policy was justified as a legitimate BFOQ.[64] In a subsequent case, the Court upheld a policy of the

63. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

64. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). Justice Marshall concurred in the remand of this case, but he admonished the majority for its inference that a BFOQ could be established by showing that women with young children have family responsibilities that interfere with job performance while men do not. He asserted that "the Court has fallen into the trap of assuming that the Act [Title VII] permits ancient canards about the proper role of women to be a basis for discrimination," *id.* at 545 (Marshall, J., concurring). *See also* Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), in which the federal appellate court found that the airlines' policy requiring only female flight attendants to be unmarried was not justified as a BFOQ.

Alabama Board of Corrections, restricting "contact" positions in maximum security prisons to male guards, as a justifiable BFOQ.[65]

Sex-based challenges to facially *neutral* prerequisites to employment have not focused on examinations which have been a central target in racial discrimination suits. Rather, such sex bias suits primarily have entailed allegations that physical requirements (*e.g.*, height and weight specifications) adversely affect women. Courts have struck down such physical prerequisites under Title VII if employers have not substantiated a legitimate business necessity for the requirements.[66]

Most sex bias suits in public employment, have involved allegations that women have been treated unfairly solely because of their sex, thus requiring proof of intentional discrimination. In these cases, plaintiffs often have attempted to establish a prima facie case of disparate treatment by presenting both specific and general statistical data. Specific data relates to the individual's qualifications for the job or promotion that was allegedly denied for discriminatory reasons. General data is presented to establish that a prevalent pattern or practice of sex bias exists in the institution. Female plaintiffs have not been able to substantiate a prima facie case of sex discrimination if the labor market data presented do not reflect the number of women actually qualified for the specific jobs in question. Also, statistical disparity data have been rejected where factors other than sex that might account for the employment decision have not been considered.[67]

Public employers have successfully rebutted a prima facie case of sex discrimination by showing that positions were filled by males who were better qualified or as qualified as females who were rejected. The Court declared in 1981 that employers are not legally obligated under Title VII to give preference to a female applicant when choosing between a male and female with similar credentials.[68] Also, employers have prevailed by showing that promotion decisions were based on factors other than sex, such as inadequate experience, scholarship or performance.[69]

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65. Dochard v. Rawlinson, 433 U.S. 321 (1977).

66. *See* SCHOOL LAW UPDATE—1977 (M.A. McGhehey ed. 1978) at 53-56.

67. *See* Wilkins v. University of Boston, 654 F.2d 388 (5th Cir. 1981), *rehearing*, 662 F.2d 1156 (5th Cir. 1981), *vacated and remanded*, 103 S. Ct. 34 (1982), *vacated and remanded in part*, 695 F.2d 134 (5th Cir. 1983).

68. Texas Dep't of Commun. Affairs v. Burdine, 450 U.S. 248, 259 (1981). *See also* Eckroth v. Flasher Pub. School Dist. No. 39, 583 F.2d 415 (8th Cir. 1978); Lombard v. School Dist. of Erie, 463 F. Supp. 566 (W.D. Pa. 1978).

69. *See* Patterson v. Greenwood School Dist. 50, 696 F.2d 293 (4th Cir. 1982); Laborde v. Regents of the Univ. of Cal., 686 F.2d 715 (9th Cir. 1982); Cummings v. School Dist. of Lincoln Cty., 638 F.2d 1168 (8th Cir. 1981); Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 663 F.2d 65 (8th Cir. 1981); Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981).

However, plaintiffs have obtained relief where employers have been unable to articulate a nondiscriminatory reason for their actions. Title VII violations have been found with evidence that female applicants were better qualified for specific jobs but were rejected in favor of males because of stereotypic attitudes toward the capabilities of women.[70] Courts similarly have awarded equitable relief where job advertisements have included the notation, "prefer man," or job descriptions have been specifically drafted to exclude qualified women.[71]

Even if the employer does produce a nondiscriminatory reason for the employment decision, it is not impossible for the employee to prove that the nondiscriminatory reason is merely pretextual. For example, in 1979 the First Circuit Court of Appeals ruled that a female university professor established that the legitimate reasons offered for her denial of promotion were a pretext for sex bias.[72] Evidence indicated that the plaintiff had been compared to a "school marm" and in other ways judged on her sex rather than merit. Moreover, the court found that evidence of a general atmosphere of sex bias in the institution, although not proof per se of disparate treatment, could be considered "along with any other evidence bearing on motive" in assessing whether the defendant's reasons were pretexts.[73] In 1980 the Fifth

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70. *See* Tyler v. Board of Educ. of New Castle Cty., 519 F. Supp. 834 (D. Del. 1981); Rodriguez v. Board of Educ. of Eastchester Union Free School Dist., 620 F.2d 362 (2d Cir. 1980).

71. *See* Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982)' Rodriguez, *id.*; Schoneberg v. Grundy Cty. Special Educ. Coop., 385 N.E.2d 351 (Ill. App. Ct. 1979). The Sixth Circuit Court of Appeals also found a Title VII violation in connection with providing female teachers facilities inferior to those provided self-contained offices for male physical education teachers and private bathroom and locker facilities. The female physical education teacher had only a small space carved out of the girls' locker room by a partition, and she shared other facilities with the students. While affirming the trial court's conclusion that the school board had violated Title VII, the appellate court ruled that the plaintiff was not entitled to compensatory damages and attorneys' fees. The court interpreted Title VII as not authorizing compensatory damages, and since the plaintiff could not be considered the prevailing party, attorneys' fees were also denied. Because the plaintiff had retired, other types of relief could not be granted, Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1978).

72. Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1970), *cert. denied*, 444 U.S. 1045 (1980). *But see* Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), in which the Sixth Circuit Court of Appeals concluded that a college's asserted nondiscriminatory reasons for denying a permanent position to a male in favor of a female were not mere pretexts for sex bias. The college produced sufficient evidence to substantiate that the decision was based on the male candidate's inadequate performance during a trial period.

73. *Id.*, 604 F.2d at 113.

Circuit Court of Appeals also declared that a plaintiff need not prove a "clear abuse of discretion" on the part of a state university to substantiate a sex discrimination charge under Title VII.[74]

In addition to Title VII's prohibition against sex discrimination in employment, sex bias in federally funded education programs can be challenged under Title IX of the Education Amendments of 1972.[75] While individuals have a private right to bring suit for injunctive relief under Title IX,[76] the act does not provide personal remedies such as reinstatement and back pay. Instead, the sanction for a Title IX violation is termination of federal funds to the program where noncompliance is substantiated.

In June, 1982, the Supreme Court settled a ten-year-old controversy[77] when it ruled six-to-three that Title IX covers employees as well as students. In *North Haven School District v. Bell*, the majority carefully reviewed the legislative history of Title IX and post enactment developments in concluding that the law applies to employees.[78] Acknowledging that the language of the act does not expressly include employees, the majority noted that there is no specific exclusion to that effect in the law's list of exceptions. Also, the majority pointed out that Congress did not pass a resolution opposing the Title IX employment regulations promulgated by the former Department of Health, Education and Welfare. Furthermore, Congress has rejected several bills that would have amended Title IX specifically to exclude employees. Although the Supreme Court endorsed the employment regulations, it held that Title IX is program specific in that it prohibits sex discrimination in educational programs directly receiving federal aid.

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74. Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1382 (5th Cir. 1980).

75. 20 U.S.C. § 1681(a) provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

76. Cannon v. University of Chicago, 441 U.S. 677 (1979).

77. Four federal appellate courts have ruled that Title IX was intended to apply only to students and consequently the employment regulations were not authorized by the statute. *See* Seattle University v. H.E.W., 621 F.2d 992 (9th Cir. 1980); Junior College Dist. of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); Romeo Community Schools v. H.E.W., 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); Iselsboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979). However, after the Second Circuit ruled that Title IX covers employees, and the Fifth Circuit held that the law applies to employees in federally funded programs, the Supreme Court agreed to address the employment jurisdiction issue. *See* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980); Dougherty Cty. School System v. Harris, 622 F.2d 735 (5th Cir. 1980).

78. 102 S. Ct. 1912 (1982).

The Department of Education waited to respond to over 200 complaints, pending resolution of the Title IX employment jurisdiction issue. Yet, there is still ambiguity as to the actual reach of the law because the Supreme Court declined to define a federally funded educational program. Lower courts recently have rendered conflicting opinions regarding whether "program" should be narrowly or broadly defined. The Third Circuit Court of Appeals on two occasions has concluded that Title IX applies to institutions of higher education whose students receive federal financial assistance even though such funds cannot be traced directly to programs allegedly in noncompliance.[79] In contrast, the First Circuit Court of Appeals rejected sex bias charges against the Harvard Law School, reasoning that the school's participation in the federally funded work study program did not make it vulnerable to an "across the board" Title IX suit charging sex discrimination in student grading practices.[80] The Sixth Circuit Court of Appeals also espoused a restrictive interpretation of Title IX as applying only to a college's programs that receive direct federal support.[81] Similarly, several federal district courts have ruled that Title IX does not prohibit sex bias in athletic programs that are not federally subsidized.[82]

Even if the Supreme Court ultimately should endorse an expansive interpretation of a federally funded program, the prospects for aggrieved employees to gain relief under Title IX are not particularly promising. The Supreme Court recently declined to review two decisions in which the Seventh Circuit held that proof of discriminatory intent is required to establish a Title IX violation and that individuals cannot seek a damages remedy under the law.[83] Although Title IX has served

79. Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982), *cert. denied*, 51 U.S.L.W. 3611 (1983); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982).

80. Rice v. President and Fellows of Harvard College, 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982).

81. Hillsdale College v. H.E.W., 696 F.2d 418 (6th Cir. 1982).

82. *See* University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981).

83. In Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1981), the appellate court reasoned that disparate impact alone, even if "defendants knew of this impact while enforcing their policies, is insufficient to establish a violation of Title IX." In Lieberman v. University of Chicago, 660 F.2d 1185, 1187-88 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1993 (1982), the appeals court declared that if Congress intends a damages remedy under a federal law, it must clearly so specify. Institutions must be given ample notice and an opportunity to reconsider their acceptance of federal aid because "theoretically, the liability could exceed the amount of federal funds received," *id.*, 660 F.2d at 118.

as a catalyst for many schools and colleges to change biased policies, the law has not yet posed a serious threat of sanctions for educational employers whose practices discriminate on the basis of sex.

Pregnancy-related Policies

Law suits alleging discrimination against pregnant employees have been initiated under federal and state constitutional and statutory provisions. Since pregnancy affects only women, disadvantages in employment that accrue because of this condition have generated numerous charges of sex bias. Courts have been called upon to address the treatment of pregnancy in disability benefits programs, in connection with leave and seniority policies, and as a basis for dismissing unwed female employees.

The exclusion of pregnancy-related disabilities from employee disability benefits programs elicited two Supreme Court rulings and stimulated congressional action in the mid-1970s. The Supreme Court ruled that the differential treatment of pregnancy in disability benefits packages does not constitute sex discrimination and thus satisfies both the Federal Constitution and Title VII.[84] The Court held that the classification involved is based on pregnancy, not on sex, noting that nonpregnant employees contain both men and women. However, in 1978 Congress reacted to the Supreme Court's interpretation of Title VII by amending the law specifically to prohibit employers from excluding pregnancy benefits in comprehensive medical and disability insurance plans.[85] As of April 29, 1979, all employers with disability programs were required to be in compliance with this provision.

A current controversy involves the application of the 1978 Pregnancy Disability Act to spouses of male employees. The Supreme Court has agreed to review a decision in which the Fourth Circuit Court of Appeals struck down a health plan that covers pregnancy for employees, but limits spouses' coverage for pregnancy.[86] The appellate court reasoned that the plan violates Title VII because it disadvantages married male employees.

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84. Geduldig v. Aiello, 417 U.S. 484 (1974) (no constitutional violation); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (no Title VII violation).

85. Pregnancy Disability Act, 42 U.S.C.A. 2000e(k) (1978). In 1982 a federal district court ruled that a state teachers' association could offer its members a disability income insurance policy (for voluntary purchase), excluding coverage for disabilities arising from pregnancy, Equal Employment Opportunity Comm'n v. California Teachers' Ass'n, 534 F. Supp. 209 (N.D. Cal. 1982).

86. Newport News Shipbuilding and Dry Dock Co. v. Equal Employment Opportunity Comm'n, 667 F.2d 448 (4th Cir. 1982), *cert. granted*, 103 S. Ct. 487 (1982). In 1983 the

Maternity leave provisions also have been the source of considerable controversy, especially in connection with educational employees. In 1974 the Supreme Court ruled that a school board policy, requiring teachers to take maternity leave at the beginning of the fifth month of pregnancy and prohibiting them from returning to work until one year after the birth of the child created an irrebutable presumption that teaching incompetency accompanies pregnancy and childbirth.[87] The denial of an opportunity for individual teachers to refute such a presumption was found to abridge the due process clause of the fourteenth amendment. More recently, the Fifth Circuit Court of Appeals ruled that a school board's maternity leave provisions violated Title VII by vesting discretion in the superintendent to determine when a teacher could return to work from maternity leave, while employees themselves determined when to return to work from sick leave.[88] The board defended its policy as a business necessity, but the court ruled that there were less discriminatory alternatives to attain the district's fiscal objectives.

However, the Ninth Circuit Court of Appeals upheld a mandatory pregnancy leave policy, requiring pregnant employees to go on leave no later than the beginning of the ninth month, as a legitimate business necessity under Title VII.[89] Recognizing the impaired physical condition and abilities of teachers during the ninth month of pregnancy and the need to plan for teachers' absences, the court ruled that mandatory leave is necessary to attain administrative and educational objectives of the district. The court also rejected a fourteenth amendment attack on the policy, reasoning that the provision did not impair the equal protection clause and was not irrational or arbitrary as was the fifth month rule invalidated previously by the Supreme Court. But the appellate court found that the school district's policy denying the use of accumulated sick leave to pregnant teachers created a prima facie case of discrimination. This portion of the ruling was remanded for

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Justice Department also initiated a suit under the Pregnancy Disabilities Act against a school district and several labor organizations for negotiating a contract that excludes pregnancy-related illnesses from disability insurance, treats illness related to childbirth differently from other illnesses for sick leave purposes and denies child care leave to men, United States v. Buffalo Bd. of Educ., *cited in* Education Daily, April 6, 1983 at 1.

87. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). *See also* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980).

88. Clanton v. Orleans Parish School Bd., 649 F.2d 1084 (5th Cir. 1981).

89. deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978). During the course of the litigation, California law was amended to prohibit both the ninth month mandatory leave and the denial of sick leave for pregnancy-related absences.

additional proceedings to ascertain if the school district could demonstrate a business necessity for denying such use of sick leave. Other courts similarly have ruled that differential treatment of pregnancy within sick leave provisions must be justified as a business necessity.[90]

In addition to the use of sick leave for pregnancy-related absences, employees often take unpaid leave if additional time off is needed to recuperate from childbirth or to care for the new infant. The Supreme Court has recognized that the denial of accumulated seniority upon return from such maternity leave violates Title VII.[91] The judiciary also has held that school boards cannot exclude pregnancy leave while including other leaves in computing a teacher's probationary period toward the award of tenure and cannot otherwise disadvantage employees because of their prior pregnancies in the calculation of seniority.[92] However, pregnancy leave is not entitled to preferred treatment. In 1982 a Massachusetts appeals court upheld a collective bargaining agreement that disallowed seniority credit for medical disability leave including pregnancy leave.[93]

In some situations a teacher's pregnant status has been the basis for dismissal or nonrenewal. In 1979 the Fourth Circuit Court of Appeals found a Title VII violation where a school district had an unwritten policy that it would not renew the contract of any teacher who could not commit to a full-year's service, and this policy had been applied only to pregnant teachers.[94] Reversing the court below, the appellate court concluded that the pregnant plaintiff, whose contract had not been renewed, established a prima facie case of sex discrimination

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90. *See* Northville Public Schools v. Michigan Civil Rights Comm'n, 325 N.W.2d 497 (Mich. App. 1982); Thompson v. Board of Educ., 526 F. Supp. 1035 (W.D. Mich. 1981); Strong v. Demopolis City Bd. of Educ., 515 F. Supp. 730 (S.D. Ala. 1981).

91. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

92. *See* Board of Educ. of Farmingdale Union Free Pub. School Dist. v. New York State Division of Human Rights, 451 N.Y.S.2d 700 (1982); Schwabenbauer v. Board of Educ., 498 F. Supp. 119 (W.D.N.Y. 1980). However, an Ohio appeals court found that a Title VII suit was not timely filed in connection with a teacher's denial of seniority for a prior year that she did not teach the required 120 days because of mandatory maternity leave, White v. Columbus Bd. of Educ., 441 N.E.2d 303 (Ohio Ct. App. 1982).

93. Burton v. School Comm., 432 N.E.2d 725 (Mass. App. 1982). In contrast to the prevailing view that pregnancy cannot be singled out for special treatment in leave policies, a Louisiana appeals court ruled that a school board is not required to grant credit toward eligibility for sabbatical leave for the time teachers were on voluntary, extended maternity leave, Newell v. Orleans Parish School Bd., 370 So. 2d 655 (La. Ct. App. 1979), *cert. denied*, 444 U.S. 1043 (1980).

94. Mitchell v. Board of Trustees of Pickens Cty. School Dist., 599 F.2d 582 (4th Cir. 1979).

because of the disparate impact of the board's action on women. The court remanded the case for additional proceedings to ascertain whether the board could justify its practice as a business necessity.

Female employees have also relied on Title VII as well as their constitutional rights to privacy and equal protection of the laws in challenging dismissals which have been based on their unwed parenthood. In 1976 the Supreme Court declined to review a case in which the Fifth Circuit Court of Appeals held that a school board's rule prohibiting the hiring of parents of illegitimate children discriminated against women in violation of the equal protection clause.[95] The appeals court rejected the school district's contention that the policy was rationally related to a legitimate governmental interest. The court did not find that unwed parenthood per se constitutes immorality or that the employment of unwed parents in a school setting contributes to the problem of pregnancies among high school girls. The Supreme Court also declined to review a case in which the Sixth Circuit ruled that the dismissal of unwed pregnant employees creates an arbitrary and unnecessary barrier to employment in violation of Title VII.[96]

In 1982 the Fifth Circuit Court of Appeals ruled that if pregnancy out of wedlock is a substantial or motivating reason for a public school teacher's dismissal, the fourteenth amendment equal protection clause is violated.[97] The federal district court had upheld a teacher's dismissal, reasoning that immorality based on the teacher's pregnant unwed status was only one of the grounds for the discharge. Since the dismissal was based in part on insubordination for the teacher's failure to adhere to board policy in notifying the superintendent of her pregnancy, the district court concluded that there was a legitimate nondiscriminatory reason that justified the discharge. Rejecting this conclusion, the

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95. Andrews v. Drew Mun. Sep. School Dist., 507 F.2d 611 (5th Cir. 1975), *cert. denied*, 425 U.S. 559 (1976). The appeals court was not persuaded that policy was gender-neutral since it applied to both male and female parents; mothers of illegitimate children are far more easily identified than are fathers of such children. Originally the Supreme Court agreed to review this case, but subsequently announced that *certiorari* had been improvidently granted.

96. Martin Sweets Co. v. Jacobs, 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1977). *See also* Dolter v. Wahlert High School, 483 F. Supp. 266 (E.D. Iowa 1980).

97. Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982). The court relied on the test outlined in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), *see* n.21. However, in 1976 the United States Federal District Court in Nebraska upheld the dismissal of a pregnant unwed teacher because of the negative impact of the teacher's condition on students. On appeal, the decision was vacated and remanded because the teacher was not afforded a predetermination hearing, Brown v. Bathke, 416 F. Supp. 1194 (D. Neb. 1976), *rev'd and vacated*, 566 F.2d 588 (8th Cir. 1977).

appellate court recognized that a teacher's right to become pregnant out of wedlock is constitutionally protected and that the teacher carried her initial burden of substantiating that her unwed status was a motivating factor in the dismissal. Concluding that the district court should have determined whether the school board could substantiate by a preponderance of evidence that the teacher would have been discharged in the absence of her unwed pregnancy, the case was remanded for such a determination to be made.

Compensation

A source of considerable controversy has been the discrepancy between mean wages for male and female workers. The Equal Pay Act (EPA) of 1963 requires equal pay for males and females for substantially equivalent work. Under EPA employers are allowed to differentiate in compensation based on (1) seniority, (2) merit, (3) productivity, or (4) any other factor not related to sex.[98] The statute of limitations for bringing suit under EPA is two years from the commencement of the act for nonwillful violations and three years for willful violations. Successful plaintiffs can be awarded back pay and an additional equal amount in liquidated damages for willful discrimination.

In 1974 the Delaware Federal District Court addressed what constitutes substantially equivalent work in addressing a school district's pay differential between a female softball coach and a male baseball coach. The court noted that jobs are considered equal if they "(1) involve the same primary job functions and (2) require substantially equal skill, effort, and responsibility."[99] Finding the coaching jobs substantially equal within the meaning of EPA, the school district was ordered to pay the plaintiff back wages and interest that would have been earned in the absence of the discriminatory practice. Furthermore, the school district was enjoined from imposing future wage differentials in violation of the act.

In 1982 the Rhode Island Federal District Court dealt with the nature of evidence required to rebut a prima facie case of discrimination under EPA and to substantiate that an employer willfully violated

98. 29 U.S.C. § 206(d)(1).

99. Brennan v. Woodbridge School Dist., 74 Lab. Cas. (CCH) 33,121 (D. Del. 1974). A New York appeals court found that a teacher's union violated Title VII because the union was aware that female coaches were paid less than male coaches and did not represent its members fairly by failing to negotiate equitable salaries, United Teachers of Seaford v. New York State Human Rights Appeal Bd., 414 N.Y.S.2d 207 (N.Y. App. Div. 1979).

the act.[100] The court distinguished the burden of proof under EPA from Title VII, noting that under the latter law, the employer only must articulate a legitimate, nondiscriminatory reason for the challenged action in order to rebut a prima facie case of disparate treatment. In contrast, to rebut a prima facie case under EPA, an employer must establish that one of the four prescribed exceptions applies to the wage differential. In order to prove willful discrimination under the act, the court reasoned that the plaintiff need not substantiate that the employer had an evil purpose in mind. A discriminatory act is considered willful if the employer acted in bad faith or did not have reasonable grounds to believe that the salary differentials were in compliance with EPA. Finding neither good faith nor a reasonable basis for a university's discrimination in compensating a female professor, the court ordered liquidated damages in an amount equal to the previously determined unpaid compensation.

The use of statistical evidence to substantiate sex-based pay differentials has been controversial. In some cases plaintiffs have established a prima facie case of discrimination by using multiple regression analysis to demonstrate the disparity between male and female salaries.[101] However, courts have rejected such statistical evidence if all factors that might influence compensation differentials have not been considered. For example, in 1982 the Eighth Circuit Court of Appeals found no prima facie case because plaintiffs' statistics did not substantiate that, after taking into account education and experience, female teachers received lower salaries than male teachers.[102] The court also concluded that the statistical evidence of discrimination in compensating female administrators and promoting women into administrative roles was insufficient. But the court found an EPA violation in connection with the compensation of female coaches who

100. Melanson v. Rantoul. 536 F. Supp. 271 (D.R.I. 1982). *See also* Equal Employment Opportunity Comm'n v. Rhode Island, 549 F. Supp. 60 (D.R.I. 1982). Although most cases under EPA have been initiated by females, male plaintiffs in the Colleges of Agriculture and Home Economics at the University of Nebraska were successful in challenging pay differentials under the act. The colleges undertook a study of salaries to identify inequities toward female employees, and the study resulted in the development of a formula to compare jobs based on education, specialization, experience, and merit. Based on the formula, thirty-three female professionals received equalization raises. Males who received salaries less than the formula but were not given equalization raises charged sex discrimination under EPA. The Eighth Circuit found that evidence substantiated that the males were the victims of unlawful sex discrimination, Board of Regents of the Univ. of Nebraska v. Dawes, 522 F.2d 380 (8th Cir. 1975).

101. *See* Trout v. Hidalgo, 517 F. Supp. 873, 879 (D.D.C. 1981).

102. Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982).

received shorter term contracts, lower salaries, and smaller extra duty stipends than male coaches performing essentially the same duties.

Despite the Equal Pay Act and comparable state statutory protections, the gap has widened in recent years between men and women as to their mean salaries. In 1955 working women took home sixty-four cents for every dollar earned by their male counterparts, but by 1980, female workers earned only fifty-nine cents for every male dollar.[103] This increasing discrepancy is alleged to be caused by the fact that employment is predominantly sex-segregated and "women's jobs" continue to be lower in status and pay than comparable jobs populated primarily by males. Thus, women recently have relied on Title VII in alleging sex discrimination because jobs of comparable worth in terms of skills, training, responsibility, and effort are not compensated equally.

The application of Title VII to sex-based discrimination in compensation has been controversial. When Congress added "sex" to the list of characteristics covered by Title VII, this action was accompanied by an amendment (the Bennett Amendment), stipulating that employers could differentiate in compensation under Title VII if the differential was authorized by the Equal Pay Act.[104] Prior to 1981, interpretation of this amendment had generated conflicting judicial opinions. Some courts had reasoned that Title VII prohibits sex discrimination in compensation only involving unequal pay for substantially equivalent work,[105] while other courts had interpreted the Bennett Amendment as incorporating EPA's affirmative defenses into Title VII, but not the equal work standard.[106] According to the latter position, Title VII's protection against sex-based discrimination in employment compensation is broader than the Equal Pay Act.

In 1980 the United States Supreme Court addressed the issue in *Gunther v. County of Washington*.[107] In this five-to-four decision, the Court established the precedent that Title VII's prohibition against sex discrimination in compensation is not confined by the Equal Pay Act.

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103. *Comparability: An Issue for the '80s*, CALIFORNIA WOMEN (Jan. 1981); R. Blumrosen, *Wage Discrimination, Job Segregation, and Women Workers*, 6 EMPLOYEE REL. L.J. 77, 79 (1980).

104. 42 U.S.C. § 200e-2(h).

105. *See* Wetzel v. Liberty Mutual Ins. Co., 449 F. Supp. 397 (W.D. Pa. 1978); Molthan v. Temple Univ., 442 F. Supp. 448 (E.D. Pa. 1977).

106. *See* International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *petition for rehearing denied*, 623 F.2d 1303 (9th Cir. 1980).

107. 452 U.S. 161 (1981).

The Court majority cautioned, however, that it was not substituting a "comparable' work standard for an "equal" work standard. It was simply extending Title VII coverage to claims beyond unequal pay for substantially equivalent work. The Court rejected the restrictive view of Title VII coverage because "a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[108] The Court noted that an employer's failure to adjust compensation based on the findings of its own job evaluation study can be used to substantiate a Title VII violation.

The concept of comparable worth, which has been called the women's issue of the '80s, does not seem likely to receive judicial endorsement in the near future, given the massive economic implications. The Equal Employment Opportunity Commission announced in October, 1982 that it does not plan to take action on the 226 claims involving comparable worth currently before it because the agency's authority in this area is unclear.[109] However, the Supreme Court's expansive interpretation of Title VII's protection against sex bias in compensation is likely to cause employers to give greater attention to job classification schemes and their justification for compensation differentials among jobs requiring comparable training, responsibility, skills, and effort.

Retirement Benefits

Differential treatment of men and women in retirement benefits programs has created extensive debate. Unlike stereotypic assumptions on which many discriminatory employment policies have been based in the past, the generalization is true that women as a class have a longer life expenctancy than men. Because of this fact, employers often have required women to pay more into a retirement program in order to receive the same benefits or have required equal contributions and provided lower benefits to retired women.

In a significant 1978 decision, *City of Los Angeles Dep't of Water v. Manhart*, the Supreme Court struck down an employer's plan in which women made a larger contribution than men to receive comparable benefits upon retirement.[110] The Court rejected the contention that

108. *Id.* at 178.
109. Education Daily, October 8, 1982 at 6.
110. 435 U.S. 702 (1978).

individuals were classified by longevity rather than sex, noting that gender was the only factor considered in predicting life expectancy. The Court found that to treat each individual female, who may or may not fit the generalization, as a class member for retirement benefits constituted sex discrimination in violation of Title VII. The Court, however, specifically limited its ruling to plans that require unequal contributions to an employer-operated pension plan.

Thus, questions have remained regarding the legality of equal contributions but unequal benefits for retired men and women. Much of the current controversy focuses on the use of sex-segregated mortality tables by the Teachers Insurance and Annuity Association and the College Retirement Equities Fund (TIAA-CREF). In 1979 TIAA-CREF announced that it would convert to unisex mortality tables, but none of the three plans proposed from 1979 until 1982 have been implemented. Either the EEOC or the New York State Superintendent of Insurance has found fault with each plan because of inadequacies in coverage or the disadvantages that would accrue to males. Thus, TIAA-CREF announced in May, 1982 that it will not convert to unisex tables until the current sex bias suits involving the program are resolved.[111]

A Supreme Court decision on this issue seems likely because in October, 1982, two federal circuit courts of appeal rendered conflicting rulings regarding the legality of TIAA-CREF's use of sex-segregated mortality tables. The Second Circuit Court of Appeals affirmed a federal district court ruling that CREF must use sex-neutral mortality tables in calculating all pension benefits paid to individuals retiring after May 10, 1980 and extended the order to include TIAA.[112] The court rejected the assertion that because TIAA-CREF is in the insurance business, it is exempt from federal regulation under Title VII.[113] The court found no meaningful distinction in the disparate treatment of men and women between programs that require unequal contributions (which were invalidated in *Manhart*) and programs that award unequal benefits such as TIAA-CREF. Recognizing the retroactive nature of the relief ordered, the court was not persuaded that

111. *TIAA-CREF to Defer 'Unisex' Pensions Until Courts Resolve 2 Lawsuits*, The Chronicle of Higher Education, May 12, 1982 at 1.

112. TIAA-CREF v. Spirt, 691 F.2d 1054 (2d Cir. 1982). *See also* Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139 (1st Cir. 1978).

113. The McCarran-Ferguson Act, 15 U.S.C. § 1012(a) stipulates that Congress cannot "invalidate, impair, or supersede" any state laws regulating the business of insurance unless the congressional act relates specifically to the insurance business. The appeals court, however, reasoned that the McCarran-Ferguson Act does not negate federal civil rights laws.

only contributions made to the fund after 1980 should be subject to unisex tables in calculating annuities, because such a remedy would defer full conversion to gender-neutral tables for as much as thirty to forty years.

In contrast, the Sixth Circuit Court of Appeals upheld TIAA-CREF's use of sex-segregated mortality tables to calculate benefits, reasoning that TIAA-CREF does not qualify as an employer under Title VII.[114] Furthermore, while recognizing that employers could be found guilty of sex discrimination in violation of Title VII if they selected a discriminatory insurer, the court concluded that TIAA-CREF's use of sex-segregated mortality tables to calculate retirement annuities does not constitute gender-based discrimination. The court noted that similarly situated men and women are treated the same under sex-segregated tables since both pay in the same amount and receive the same benefits if they live to the average age of their class. The court reasoned that a plan using sex-neutral tables would provide greater benefits to women because of their longer life expectancy. According to the court, the use of longevity to distinguish between males and females in pension benefits is not an "artificial, arbitrary, and unnecessary barrier to employment" proscribed by Title VII.[115]

Although the United States Supreme Court has not yet addressed the TIAA-CREF controversy, the high court has agreed to review an Arizona case involving a retirement plan involving the use of sex-segregated actuarial tables in a deferred compensation plan. In 1982 the Ninth Circuit Court of Appeals found that the plan violated Title VII because upon retirement female employees will receive lower monthly annuity payments than male employees contributing the same amount.[116] Rejecting the argument that relief was barred because Title VII cannot be used to regulate insurance companies, the court emphasized that it was not enjoining the company from using sex-segregated annuity tables. Rather, it was barring a public employer from contracting with a company to offer "a fringe benefit which treats an individual woman differently than an individual man."[117]

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114. Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).

115. *Id.* at 241, *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

116. Norris v. Arizona Governing Comm., 671 F.2d 330 (9th Cir. 1982).

117. *Id.* at 333. In November, 1982 the Supreme Court refused to grant "expedited consideration" to TIAA-CREF's request that *TIAA-CREF v. Spirt* be considered along with the Arizona case. This action does not mean that the Supreme Court ultimately will decline to review one or both of the recent federal appellate decisions involving TIAA-CREF. It simply means that the cases must go through the normal petition review process. *See* Education Daily, Nov. 16, 1982 at 1-2.

The appellate court affirmed the district court's order enjoining the state from providing benefits based on sex-segregated tables and requiring equal future benefits for similarly situated male and female employees. Since the Supreme Court has agreed to review this case, some of the issues associated with using sex-segregated mortality tables in calculating retirement benefits soon may be resolved.

Sexual Harassment

Charges of sexual harassment have presented particular problems for the judiciary. The term sexual harassment is generally used to refer to "repeated and unwelcomed advances, derogatory statements based on . . . sex, or sexually demeaning gestures or acts."[118] While sexual harassment is not a recent phenomenon, case law in this area is in its infant stage. Most of the litigation has been brought under Title VII's anti-sex discrimination provisions.

Inititally, courts concluded that claims of sexual harassment were beyond the purview of Title VII.[119] However, in the mid-1970s courts began interpreting Title VII as providing a remedy to victims of sexual harassment that results in adverse employment consequences such as termination, demotion, or denial of other benefits. Courts have distinguished "sexual advances of an individual or personal nature" or "an isolated incident or flirtation" from sexual harassment that "substantively" affects the employee in that it constitutes a term or condition of employment.[120] Back pay and accompanying employment benefits have been awarded in several instances where employers have not successfully rebutted charges that an employee has been terminated or otherwise disadvantaged because of rejection of sexual advances.[121] Employers also have been found in violation of Title VII if they have failed to investigate employee complaints of sexual harassment by supervisors, even if the supervisors' acts have violated company policy.[122]

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118. D. Nolan, *Sexual Harassment in Public and Private Employment*, 3 EDUC. L. REP. 227 (1982).

119. *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975); Barnes v. Train, 13 FEP Cases (BNA) 123 (D.D.C. 1974).

120. *See* Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978).

121. *See* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins, *id.*; Vinson v. Taylor, 23 FEP Case (BNA) 37 (D.D.C. 1980); Heelan, *id.*

122. *See* Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); Brown v. City of Guthrie, 22 FEP Cases (BNA) 1627 (D. Okla. 1980); Munford v. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).

In a significant 1981 case, the Washington, D.C. Circuit Court of Appeals ruled that sexual harassment per se violates Title VII; an employee need not prove that the harassment resulted in penalty or loss of tangible job benefits.[123] The appellate court found that improper sexual behavior toward female employees was a standard operating procedure in the plaintiff's office and that her complaints of harassment were not taken seriously. The court reasoned that proof that the harassing conduct had occurred was sufficient to establish a Title VII violation. This case suggests that the judiciary may become more willing to consider intangible as well as tangible losses in reviewing charges of sexual harassment.[124]

In 1980, the EEOC issued guidelines stipulating that sexual harassment violates Title VII if it is an explicit or implicit term or condition of employment, is used as a basis for employment decisions, or has the "effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[125] Thus, the EEOC guidelines also indicate that the effect of sexual harassment on working conditions as well as on an employee's status can be considered in Title VII cases. Under the guidelines, employers are responsible for sexual harassment of employees by supervisors, but not for acts among co-workers unless the employer knew or "should have known" of the harassing behavior and failed to take "immediate and appropriate corrective action."[126] Hundreds of sexual harassment charges have been filed with EEOC since the guidelines were adopted, and it seems likely that the number of Title VII law suits involving this issue will escalate during the coming decade.

Sexual harassment cases under state anti-discrimination provisions also seem destined to increase. In 1980 the Minnesota Supreme Court interpreted state law as placing an obligation on employers to curb sexual

123. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

124. However, some courts since this decision have continued to require evidence of adverse employment consequences resulting from the harassment. *See* Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981); Davis v. Bristol Laboratories, 26 FEP Cases (BNA) 1351 (D. Okla. 1981); Meyers v. I.T.T. Diversified Credit Corp., 527 F. Supp. 1064 (D. Mo. 1981).

125. 29 CFR § 1604.11(a) (1980). Also, Department of Education's Office for Civil Rights is authorized to investigate complaints of sexual harassment in federally-funded educational programs under Title IX of the Education Amendments of 1972. *See* L. Berthel, *Sexual Harassment in Education Institutions*, 10 CAPITAL UNIV. L. REV. 585-590 (1981).

126. *Id.*, § 1604.11(d). *See* R. Joyce, *Defusing Sexual Harassment in the Workplace*, 13 SCHOOL L. BULL. 1-15 (July 1982).

harassment among co-workers (which is not covered by Title VII).[127] The court ruled that an employer violated the Minnesota Human Rights Act by taking no action when the plaintiff notified her superior regarding sexually derogatory remarks and verbal and physical sexual advances by co-workers. Only after the situation degenerated into violent assaults did the company take corrective action. The court ruled that the employer was liable for failure to respond to the complaints in a timely fashion.

Although charges of sexual harassment are problematic, administrative agencies and the courts have become more inclined to address this subject than was true a decade ago. Stakes are particularly high in sexual harassment cases because reputations and sometimes family harmony are jeopardized. Accordingly, many employers have been motivated to design policies prohibiting sexual harassment, to educate their employees regarding the negative consequences of such conduct, and to develop explicit procedures for resolving sexual harassment complaints.

127. Continental Can Co., Inc. v. Minnesota, 297 N.W.2d 241 (Minn. 1980). In 1982 a New Mexico appeals court reasoned that sexual harassment constitutes unsatisfactory work performance under state educational law. Accordingly, two work conferences and the opportunity to eliminate the unsatisfactory conduct are required before dismissal of public school personnel for this statutory cause, Board of Educ. of Alamo-Gordo Pub. School Dist. No. 1 v. Jennings, 651 P.2d 1037 (N.M. App. 1982).

National Origin Discrimination

Similar to claims of racial bias, allegations of discrimination based on national origin most often have been initiated under the equal protection clause of the fourteenth amendment or Title VII. Facially discriminatory policies generally have not been at issue. Instead, plaintiffs usually have challenged their alleged disparate treatment based on national origin, and thus have carried the burden of proving discriminatory intent. In an illustrative case, the Ninth Circuit Court of Appeals ruled that even if a Mexican-American curriculum supervisor had been able to establish an inference of discrimination, the school board's evidence that the supervisor was not able to work well with other employees was sufficient to satisfy its burden of articulating a legitimate nondiscriminatory reason for nonrenewal of her contract.[128] A Michigan federal district court similarly found that there must be evidence of discriminatory acts to establish a prima facie case under Title VII; the lack of personnel policies and an affirmative action plan pertaining to the hiring of national origin minorities would not suffice.[129]

Although most suits involving national origin discrimination have involved allegations of disparate treatment, the disparate impact criteria have been applied in some cases. For example, the Tenth Circuit Court of Appeals found that a prima facie case of national origin discrimination was established by evidence that the employer had never promoted a Spanish-American employee coupled with the vague and subjective promotion criteria used.[130] The employer did not rebut the prima facie case with adequate proof of a business necessity for the discriminatory promotion practices. However, the court did not find that the employer deliberately rendered the employee's working conditions so intolerable as to force the claimant to quit his job (constructive discharge). The plaintiff was thus entitled only to the difference between actual pay and the amount he would have made if selected as a foreman during the two year period before he quit.

While courts have strictly interpreted the procedural requirements for filing a Title VII suit, under certain circumstances a plaintiff might be entitled to equitable tolling of the time limitation. Such equitable tolling was considered appropriate where a foreign-born

128. Correa v. Nampa School Dist. No. 131, 645 F.2d 814 (9th Cir. 1981). *See also* Panlilio v. Dallas Indep. School Dist., 643 F.2d 315 (5th Cir. 1981).
129. Skelnar v. Central Bd. of Educ., 497 F. Supp. 1154 (E.D. Mich. 1980).
130. Muller v. United States Steel Co., 500 F.2d 923 (10th Cir. 1975).

plaintiff was not aware of the potential discrimination accompanying his discharge until several months later when his "abolished" position was again filled.[131] However, a plaintiff cannot bring a federal discrimination suit regarding an issue that has already been litigated by the state judiciary. In 1982 the Supreme Court ruled that since a state court found a claim of national origin discrimination meritless under state law, the plaintiff was barred from relitigating the same issue under Title VII.[132]

In 1982 the Supreme Court also dealt with class certification in connection with allegations of discrimination based on national origin. The lower courts had found discrimination associated with the Mexican-American plaintiff's denial of promotion. But the Supreme Court ruled that the district court erred in permitting the respondent to maintain a class action on behalf of Mexican-American employees who were denied promotion as well as applicants who were rejected for employment.[133] The Court noted that an individual litigant seeking a class action must satisfy federal rules of civil procedure which specify prerequisites of numerosity, commonality, typicality, and adequacy of representation. The respondent must do more than prove the validity of his own claim to bridge the gap between this charge of discrimation in the denial of promotion and the existence of a class of persons who have suffered the same injury. Accordingly, the Supreme Court instructed the lower court to determine whether the respondent's claim is typical of other Mexican-American employees and applicants.

Related to allegations of discrimination based on national origin are challenges to citizenship requirements. In 1973 the United States Supreme Court rejected the contention of a foreign-born plaintiff that she had been discriminated against under Title VII because an employer refused to hire persons who were not citizens of the United States.[134] More recently, the Court rejected a constitutional challenge to a New York education law denying teacher certification to individuals who are eligible for citizenship but refuse to apply for naturalization.[135] Recognizing that classifications based on citizenship

131. Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982). However, a plaintiff was unsuccessful in securing an extension of the 90-day limitation following receipt of a right to sue letter where extraordinary circumstances did not prevent him from asserting his right and no fraud was involved, Aljadir v. University of Pa., 547 F. Supp. 667 (E.D. Pa. 1982).
132. Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982).
133. General Telephone Co. of the Southwest v. Falcon, 102 S. Ct. 2364 (1982).
134. Espinoza v. Farah Mfg., 414 U.S. 86 (1973).
135. Ambach v. Norwick, 441 U.S. 68 (1979).

(unlike those based solely on national origin) are not suspect, the Court applied the rational basis equal protection test. The Court concluded that the state's interest in attaining its educational goals was rationally related to the citizenship requirement for teacher certification; individuals who do not wish to apply for United States citizenship cannot adequately convey appropriate citizenship values to students. The Court declared that certain functions are "so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."[136] The Supreme Court similarly has upheld a statute requiring state police officers to be citizens of the United States.[137] However, the Court has invalidated a law specifying that only citizens could be hired in any competitive classified civil service positions.[138]

136. *Id.* at 73-74.
137. Foley v. Connelie, 435 U.S. 291 (1978).
138. Sugarman v. Dougall, 413 U.S. 634 (1973).

Religious Discrimination

Individuals enjoy explicit constitutional protection against governmental intereference with their religious freedom. Under the first amendment to the Federal Constitution, Congress is prohibited from enacting a law *respecting the establishment* of religion or interfering with the *free exercise* of religious beliefs. These provisions have been made applicable to the states through the fourteenth amendment.

The Supreme Court has recognized on numerous occasions that while the freedom to believe is absolute, the freedom to act on those beliefs is subject to reasonable governmental regulations.[139] For example, public educators cannot assert a free exercise right to conduct devotional activities in public schools or to proselytize students; the establishment clause prohibits such activities.[140] Similarly, the free exercise clause does not entitle teachers to disregard a portion of the state-prescribed curriculum that conflicts with their religious views.[141]

Although public employees cannot use their governmental positions to spread their faith, neither must they relinquish their religious beliefs as a condition of employment. Prerequisites to public employment that entail a profession of sectarian faith abridge the first amendment. For example, the Supreme Court invalidated a Maryland law requiring notary publics to sign an oath affirming their belief in God.[142] Also, public employees have a free exercise right to abstain from certain observances and activities that conflict with their religious beliefs as long as such abstention does not impede their work performance. To illustrate, public school teachers have a first amendment right to refrain from saluting the American flag and pledging their allegiance, even though they cannot deny students the opportunity to engage in these

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139. *See* Torcasco v. Watkins, 367 U.S. 488 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

140. *See* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Fink v. Board of Educ. of Warren Cty. School Dist., 442 A.2d 837 (Pa. Commw. Ct. 1982); LaRocca v. Board of Educ. of Rye City School Dist., 406 N.Y.S.2d 348 (N.Y. App. Div. 1978). School authorities may be subject to personal liability for violating clearly established constitutional rights if they condone such devotional activities in public schools. *See* Abramson v. Anderson, No. 81-26W (D. Iowa 1982).

141. Palmer v. Board of Educ. of City of Chicago, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

142. Torcaso v. Watkins, 367 U.S. 488 (1961). *See also* Beauregard v. City of St. Albans, 450 A.2d 1148 (Vt. 1982), in which the Vermont Supreme Court ruled that membership on the public school board of trustees could not be conditioned on religious preference.

observances. In 1972 the Second Circuit Court of Appeals declared that "the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence."[143]

In addition to first amendment rights, employees are protected from religious discrimination under Title VII. In the 1972 amendments to Title VII, Congress stipulated that the protection against religious discrimination includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[144] The EEOC has promulgated guidelines with suggested religious accommodations such as accepting voluntary substitutes and assignment exchanges, using flexible scheduling, and changing job assignments.

Many controversies have arisen over the degree of religious accommodations in work schedules required under Title VII. In a significant 1977 case a plaintiff challenged his dismissal for refusing to work on Saturdays in contravention of his religious beliefs. The employer, Trans World Airlines (TWA), asserted that a Saturday schedule could not be avoided because shift assignments were based on seniority on conformance with the collective bargaining agreement. Evidence also showed that TWA had taken appropriate steps in meeting with the plaintiff and attempting to find someone to exchange shifts. The United States Supreme Court found no Title VII violation, reasoning that an employer is not required to bear more than minimal costs in making religious accommodations. The Court further noted that the employer is not required to disregard a bona fide seniority system in the absence of proof of intentional discrimination.

Although employers are not required to make costly religious accommodations, in several education cases plaintiffs have proven that requests for religious absences would not place undue burdens on the school. For example, in 1981 the Fourth Circuit Court of Appeals affirmed a federal district court's conclusion that the discharge of a teacher's aide for absences to observe the seven-day convocation of the

143. Russo v. Central School Dist. No. 1, 469 F.2d 623, 634 (2d Cir. 1971). *See also* Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1370).

144. 42 U.S.C. § 2000e(j) (1976).

145. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

Worldwide Church of God violated Title VII.[146] However, the appellate court disagreed with the district court's conclusion that the aide was entitled only to back pay from the time of her discharge to the end of her one-year contract. Reasoning that Title VII creates a substantive right to nondiscriminatory treatment, the appeals court held that the plaintiff was entitled to back pay (mitigated by interim earnings) from the time of the discharge until a valid offer of reinstatement was made.

In 1980 a New Jersey federal district court also concluded that religious absences were a "substantial motivating factor" in the dismissal of a teacher in violation of Title VII.[147] Finding that the absences created no hardship for the school or students, the court ordered the teachers' reinstatement with back pay. However, the court denied the teacher's request for compensatory and punitive damages. The court was not persuaded that the teacher suffered mental and emotional distress or that the superintendent and board acted with malicious and wanton disregard for his constitutional rights.

In addition to federal requirements, most states also have constitutional or statutory provisions protecting individuals from religious discrimination. Interpreting such a provision, the California Supreme Court ordered reinstatement of a teacher who had been terminated for unauthorized absences for religious reasons.[148] The court held that the teacher was entitled to unpaid leave for religious observances since no evidence was presented that the teacher's absences had a detrimental effect on the educational program. However a Colorado appeals court upheld the dismissal of a tenured teacher for similar unauthorized religious absences, reasoning that his teaching duties had been neglected.[149] The court ruled that the termination was justified and did not violate Colorado's anti-discrimination law because testimony indicated that the teacher's four unauthorized absences interfered with the academic progress of his students and disrupted the management of the school.

While public employers generally attempt to accommodate reasonable absences for religious reasons, paid leave need not be provided for

146. Edwards v. School Bd. of Norton, Va., 483 F. Supp. 620 (W.D. Va. 1980), *vacated and remanded*, 858 F.2d 951 (4th Cir. 1981).

147. Niederhuber v. Camden Cty. Voc.-Tech. School Dist., 495 F. Supp. 273 (D.N.H. 1980).

148. Rankins v. Commission on Professional Competence, 593 P.2d 852 (Cal. 1979), *appeal dismissed*, 444 U.S. 986 (1979).

149. School Dist. No. 11, Joint Counties of Archuleta and LaPlata v. Umberfield, 512 P.2d 1166 (Colo. Ct. App. 1973).

this purpose. Indeed, paid leave tied specifically to religious observances implicates the establishment clause. For example, in a New Jersey case, public school teachers were allowed to use personal leave days for religious as well as other purposes, but the teachers' association sought specific paid leave for religious observances.[150] The state supreme court ruled that the establishment clause prohibits the school board from granting such religious leave, and, therefore, negotiations over this item would be unconstitutional. The court reasoned that is specific leave were designated for religious reasons, the non-religious employee could never enjoy the proposed benefit. Similarly, in 1976 a California appeals court struck down a proposed order by the governor, granting state employees paid leave for three hours on Good Friday for religious worship.[151] The court found that the order did not have a secular purpose and served to advance religion.

Public employees, like all citizens, enjoy constitutional and statutory protection of their religious freedoms. Employers are expected to make reasonable accommodations to enable individuals to practice their faith, as long as the accommodations do not create substantial hardships. Employees should not be disadvantaged or advantaged because of their religious beliefs. However, a minimal impairment of the right to practice those beliefs may be required in some settings, such as public schools, to assure that religion is not being advanced under the auspices of the state.[152]

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150. Hunterdon Cent. High School Bd. of Educ. v. Hunterdon Cent. High School Teachers' Ass'n, 416 A.2d 980 (N.J. Super. App. Div. 1980).

151. Mandel v. Hodges, 127 Cal. Rptr. 244 (Cal. Ct. App. 1976). However, the following year a California appeals court upheld a school district's collective bargaining agreement, designating Good Friday as a paid holiday for all employees. The court reasoned that the main purpose of the agreement was to afford teachers a longer spring vacation, and the paid holiday was not expressly tied to religious worship, California School Employment Ass'n v. Sequoia Union High School, 136 Cal. Rptr. 594 (Cal. Ct. App. 1977).

152. *See* Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 102 S. Ct. 1267 (1982); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 322 (1981); Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1981).

Discrimination Based on Handicaps

Handicapped individuals are protected from discrimination by the equal protection clause and various federal and state civil rights laws. The most extensive legal protections against employment discrimination in this regard are contained in section 504 of the Rehabilitation Act of 1973; thus, most recent litigation involving claims of employment bias against the handicapped have been initiated under this law. Section 504 provides in part that "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[153]

The United States Supreme Court delivered its first opinion interpreting section 504 in 1979.[154] In this case a licensed practical nurse brought suit after she was denied admission to a college progam to train registered nurses. Her application was rejected because of her serious hearing deficiency which the college asserted would prohibit her from participating in all aspects of the program and would pose a danger to her future work with patients. The Supreme Court concluded that section 504 does not compel an institution to ignore the disabilities of an individual or to substantially modify its program to enable a handicapped person to participate. Instead, section 504 prohibits institutions from barring an otherwise qualified handicapped person "who is able to meet all of a program's requirements in spite of his handicap."[155]

In employment cases, courts have reiterated that section 504 requires reasonable accommodations only for handicapped persons who are otherwise qualified. For example, a blind California teacher was unsuccessful in challenging the school board's failure to appoint him to an administrative position because the board produced evidence that the plaintiff did not possess the requisite administrative skills or leadership experience for an administrative job.[156] The court rejected both equal protection and section 504 claims, finding that the individual

153. 29 U.S.C. § 794 (1976).

154. Southeastern Commun. College v. Davis, 442 U.S. 397 (1979).

155. *Id.* at 406. The judiciary has interpreted section 504 as providing individuals a private right to bring suit under the law. *See* Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981).

156. Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979). *See also* Sabol v. Board of Educ. of Township of Willingboro Cty., 510 F. Supp. 892 (D.N.J. 1981).

was not otherwise qualified for an administrative position and that there was a rational basis for the board's decision. Also, the court rejected the assertion that the board's action violated due process guarantees by creating an irrebutable presumption that blind persons were unqualified to serve as administrators; the board did not impose a blanket ban on hiring blind employees in leadership roles. Moreover, the court reasoned that it was permissible for the committee to inquire as to how the teacher would cope with his blindness in fulfilling job responsibilities.

In 1979 the Tenth Circuit Court of Appeals similarly ruled that a blind individual's due process rights were not violated in his rejection for a position as a research analyst in a federal agency. Evidence supported that the plaintiff's application was given individual attention and that the employer did not make an irrebutable presumption that blind persons could not perform the job. Furthermore, the court noted that some presumptions necessarily are made in assessing job applications: "Merely because such 'presumptions' are a fact of business life does not mean that 'trial periods' should be required for all, or even all handicapped, applicants, and certainly not if an applicant's qualifications are individually considered in relation to legitimate job requirements."[157] The court further found that the plaintiff had no property right at stake, but rather a unilateral expectation or abstract desire for the job.

However, handicapped individuals have successfully challenged employment decisions with evidence that they are qualified for the job and have been disadvantaged solely because of their handicaps. For example, the Third Circuit Court of Appeals held that a blind teacher was entitled to back pay and retroactive seniority from the time she would have been hired, absent the school district's unlawful policy barring disabled persons from taking an examination which was a prerequisite to employment.[158] Since the suit was initiated before the effective date of section 504, it was resolved on federal constitutional grounds. The appeals court ruled that the school district had violated due process guarantees by creating an irrebuttable presumption that blindness per se was evidence of incompetence. But the court denied

157. Coleman v. Darden, 595 F.2d 533, 537 (10th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979).

158. Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977), *aff'd in part, vacated and remanded in part*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

the teacher's request for tenure to be granted, reasoning that the award of tenure should be based on the school district's assessment of the teacher's performance. More recently, a New York federal district court ruled that a school district's preemployment inquiries about an applicant's prior mental problems were impermissible under section 504 because the questions were not related to his present fitness for the position of teacher's aide.[159]

Physically handicapped plaintiffs have also prevailed in challenging their exclusion from employment as school bus drivers, if established that they can perform the job with reasonable accommodations. In an illustrative case, a Texas federal district court concluded that an individual, who wore an artificial leg below the knee, was denied employment as a bus driver in violation of section 504.[160] Evidence indicated that the plaintiff was a capable driver and was excluded from employment solely because of the Texas Education Association's rule prohibiting persons with missing extremities from being hired as bus drivers. The court ordered the school district to hire the plaintiff in the first available position, but rejected his request for damages, concluding that equitable relief under section 504 does not include a damages award.

In several recent cases, courts have ruled that section 504 prohibits discrimination based on handicaps *only* in programs receiving federal funds. For example, in 1982 the Eleventh Circuit Court of Appeals addressed a case in which a university professor was placed on involuntary sick leave and then put on probation and denied a salary increase allegedly because of her alcoholism.[161] The professor claimed, among other charges, that the board's action violated her rights protected by section 504 because the state university was under a federally enforceable duty not to discriminate on the basis of her handicap. The court, however, ruled that section 504 does not apply to the entire university, but only to programs that benefit directly from federal aid. Since the plaintiff did not allege that the program in which she was employed was directly benefited by federal financial assistance, the appellate court ruled that her section 504 claim was correctly dismissed. The Fifth Circuit Court of Appeals similarly reasoned that "a private

159. Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981).

160. Longoria v. Harris, 554 F. Supp. 102 (S.D. Tex. 1982). *See also* Coleman v. Casey Cty. Bd. of Educ., 510 F. Supp. 301 (W.D. Ky. 1980); State Division of Human Rights v. Averill Park Cent. School Dist., 388 N.E.2d 729 (N.Y. 1979); Commonwealth of Pa. Dep't of Transp. v. Byrd, 399 A.2d 425 (Pa. Commw. Ct. 1979).

161. Dole v. University of Alabama in Birmingham, 680 F.2d 1323 (11th Cir. 1982).

plaintiff in a section 504 case must show that the program or activity with which he or she was involved or from which he or she was excluded, itself received or was directly benefited by federal financial assistance."[162]

A Pennsylvania federal district court also recently ruled that section 504 is program specific. The court concluded that section 504 is similar to Title IX which the Supreme Court has interpreted as prohibiting discrimination only in programs or activities receiving federal financial assistance.[163] However, the court recognized that it would be possible for a board of education to be subject to a section 504 suit if its federal financial assistance is so substantial "that the entire operation of the school system may be treated as a 'program' for purposes of section 504."[164] Thus, the court denied a school board's request for a summary judgment in connection with the termination of a blind mathematics teacher.

Courts will review employment decisions carefully to ensure that handicapped persons are not disadvantaged solely because of their disabilities. A handicapped person is considered qualified if capable of performing the job with reasonable accommodations that do not present an undue business hardship. In evaluating the hardship imposed, courts consider the extent of the necessary accommodation and its expense. Employers are not required to make substantial adjustments in working conditions to accommodate handicapped individuals or to hire disabled persons who are not qualified for the job.

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162. Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981).
163. Pittsburg Federation of Teachers, Local 400 v. Langer, 548 F. Supp. 434 (W.D. Pa. 1982). *See* text n.78 *supra*, for a discussion of Title IX.
164. *Id.* at 437.

Age Discrimination

Age is distinct among attributes discussed in this chapter in that all individuals are subject to the aging process. Because of medical progress in prolonging life coupled with the post-World War II decline in birthrates, the mean age of the American population has steadily climbed in recent years. This phenomenon has been accompanied by increasing public concern for the problems associated with aging and by legislative enactments prohibiting age-based discrimination. Similar to allegations of race and sex bias, claims of employment discrimination on the basis of age have been initiated under both the equal protection clause and federal and state statutory protections.

In 1976 the United States Supreme Court addressed a constitutional challenge to a Massachusetts law requiring the retirement of uniformed police officers at age fifty.[165] Noting that age is not a suspect class and public employment is not a fundamental right, the Court reasoned that the retirement policy need only be rationally related to a legitimate state objective to satisfy equal protection mandates. The Court found that the retirement of police officers at an early age has a rational relationship to the objective of protecting the public by assuring a physically competent police force. The Supreme Court subsequently applied similar reasoning in ruling that mandatory retirement at age sixty in the United States Foreign Service has a rational relationship to the legitimate objective of conducting foreign relations with a competent and physically fit staff.[166]

In the school context, the Second Circuit Court of Appeals upheld a New York statute mandating teacher retirement at age seventy as having a rational basis.[167] The court noted that teachers are under physical demands and further reasoned that the retirement statute advances the legitimate objectives of (1) allowing young individuals and minorities to be hired, (2) bringing fresh ideas into the classrooms, and (3) facilitating the administration of pension plans by predictable retirement dates. Also, the Third Circuit Court of Appeals found that a teacher's fourteenth amendment rights were not violated by requiring her to retire at age sixty-five since all persons similarly situated were treated the same under the law.[168]

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165. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

166. Vance v. Bradley, 440 U.S. 93 (1979).

167. Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978). *See also* Nagle v. Board of Educ., 629 P.2d 109 (Hawaii 1981).

168. Kuhar v. Greensburg-Salem School Dist., 616 F.2d 676 (3d Cir. 1980). The appeals court reasoned that the plaintiff had no statutory right to work beyond age 65 because the

However, the Seventh Circuit Court of Appeals departed from the prevailing view in using the equal protection clause to strike down a school board's policy mandating retirement for public school teachers at age sixty-five.[169] The court concluded that the mandatory retirement provision was not rationally related to the objective of eliminating unfit teachers. According to the court, competence should be judged on an individual basis, and a teacher's fitness to teach should *not* be assessed solely on age.

Although legislative enactments that classify individuals on the basis of age can satisfy equal protection guarantees if rationally related to a legitimate governmental objective, in recent years plaintiffs have not had to rely on constitutional protections in challenging age-based employment discrimination. In 1967 Congress enacted the Age Discrimination in Employment Act (ADEA) which prohibits employers, employment agencies, and labor unions from discriminating against employees on the basis of age in hiring, promotion, and compensation. The act was intended to eliminate arbitrary, irrational age barriers to employment so that employment opportunities can be based on merit and ability. The protected category includes employees from forty to seventy years old. The upper limit was extended from sixty-five to seventy in an amendment to ADEA in 1978, but there is no upper limitation for federal employees.[170] Remedies for violations of ADEA include (1) injunctive relief, (2) offer of employment or reinstatement, (3) back pay, and (4) liquidated damages where established that age discrimination was unlawfully motived. Successful plaintiffs can also be awarded attorneys' fees.

Age classifications can be justified under ADEA if age is a bona fide occupational qualification necessary to the normal operation of a particular business: "An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty."[171] Public employers have successfully substantiated an age

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1978 ADEA amendments were not effective when this case was initiated. The lower court had ruled in favor of the plaintiff, concluding that there was no showing that mandatory retirement at age 65 would advance the goal of furnishing children the "best education at the most affordable cost," 466 F. Supp. 806, 814 (W.D. Pa. 1979).

169. Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979).

170. 29 U.S.C. § 621. The amendment extending the upper age limit to 70 allowed colleges and universities to compel tenured faculty members to retire at age 65 until July 1, 1982. Employers can observe the terms of a bona fide retirement benefit plan as long as such a plan does not compel retirement prior to age 70.

171. Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591 (5th Cir. 1978). *See* 29 U.S.C. § 623(f).

BFOQ for certain roles such as bus drivers.[172] Since establishment of a BFOQ is an affirmative defense (in contrast to rebuttal of a prima facie case), the burden is on the employer to produce appropriate evidence.

Individuals have a private right of action under ADEA, but available state administrative remedies must first be pursued, although not exhausted. A federal suit is not precluded simply because a state agency concludes that an age discrimination claim is insufficiently detailed to institute proceedings under state law.[173] Courts have denied relief where plaintiffs have not filed charges within the required 180 days of the discriminatory act or within 300 days if state proceedings have been initiated. However, a Maryland federal district court found that an ADEA suit was not time barred since the claimant did not become aware of the discriminatory reasons for his discharge until several months after his termination.[174]

There has been considerable litigation over the constitutionality of the 1974 amendments to ADEA, extending the act's protections to state and local government employees. In March 1983 the Supreme Court settled the issue by ruling five-to-four that the amendments constitute a valid exercise of congressional power under the Commerce Clause of the Federal Constitution.[175] The Court reversed the Wyoming federal district court's conclusion that ADEA imposes an encroachment on state authority preserved by the tenth amendment. The Supreme Court majority concluded that ADEA does not involve an attribute of state sovereignty essential for carrying out traditional governmental functions. Noting that the state retains the authority to assess the fitness of employees and to dismiss those considered unfit, the majority reasoned that "the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but

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172. *See* Sposato v. Ambach, 453 N.Y.S.2d 149 (N.Y. Sup. Ct., Albany Cty. 1982).

173. *See* Punch v. Singer Co., 463 F. Supp. 450 (S.D.N.Y. 1978). For a discussion of procedural requirements under ADEA, *see* Sanders v. Duke Univ., 538 F. Supp. 1143 (M.D.N.C. 1982); Benima v. Smithsonian Inst., 471 F. Supp. 62 (D. Mass. 1979); Enos v. Kaiser Indust. Corp., 443 F. Supp. 798 (D.D.C. 1978); A. Butler & R. Brooks, *The Trial of Age Discrimination Suits*, 45 TEXAS B.J. 425-434 (1982).

174. Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982).

175. Equal Employment Opportunity Comm'n v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1982), *rev'd* 51 U.S.L.W. 4219 (U.S. March 2, 1983). The lower court had relied on National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Supreme Court invalidated congressional action to extend the minimum wage requirements of the Fair Labor Standards Act to state and local government employees because it directly displaced state authority to carry out traditional governmental functions.

it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them."[176]

The substantive provisions of ADEA are almost identical to those of Title VII of the Civil Rights Act of 1964, and the judicial criteria developed in Title VII cases are often adapted to evaluate age discrimination charges under ADEA. Most courts have required a showing of discriminatory intent in ADEA cases, thus adopting the disparate treatment standard of review. In 1979 the First Circuit Court of Appeals declared that in ADEA cases, the jury should be instructed that a plaintiff must prove "by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged."[177] Several other federal appellate courts have concluded that an ADEA violation can be established with proof that age is a determining factor in that it made a difference in the promotion, retention, or discharge decision.[178] Employers have been able to rebut a prima facie case of disparate treatment based on age by articulating nondiscriminatory reasons for dismissals, such as excessive tardiness, poor performance, or inability to relate to a supervisor.[179]

However, in 1980 the Second Circuit Court of Appeals ruled that plaintiffs could establish a violation of ADEA by establishing that employment practices, regardless of motive, have a disparate impact on older employees.[180] In this case the defendant school board adopted a cost-cutting policy of preferentially hiring teachers with fewer than five years experience. Evidence substantiated that over ninety-two percent of the state's teachers over forty years of age had at least five years of experience, whereas only sixty-two percent of teachers under forty

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176. *Id.*, 51 U.S.L.W. at 4223. *See also* Equal Employment Opportunity Comm'n v. Elrod, 674 F.2d 601, 611 (7th Cir. 1982); McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982); Kenney v. Board of Trustees of Valley Cty. School Dist. Nos. 1 and 1-A, 543 F. Supp. 1194 (D. Mont. 1982).

177. Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). For a discussion of the similarities between ADEA and Title VI, *see* Oscar Mayer Co. v. Evans, 441 U.S. 750 (1979); Lorillard v. Pons, 434 U.S. 575 (1978).

178. *See* Haring v. CPC International, Inc., 664 F.2d 1234, 1239 (5th Cir. 1981); Smithers v. Bailar, 629 F.2d 892, 897 (3d Cir. 1980); Cleverly v. Western Electric Co., 510 F.2d 307, 315 (6th Cir. 1975).

179. *See* Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) (poor performance); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977) (poor performance); Kerwood v. Mortgage Bankers Ass'n, 494 F. Supp. 1298 (D.D.C. 1980) (inability to relate to supervisor); Brennan v. Reynolds and Co., 367 F. Supp. 440 (N.D. Ill. 1973) (excessive tardiness).

180. Geller v. Mackham, 635 F.2d 1027, 1032 (2d Cir. 1980).

had this much experience. The court concluded that the policy with a disparate impact on teachers over forty had to be justified as a job necessity to satisy ADEA. A Missouri federal district court applied similar logic in evaluating a prima facie case of age discrimintaion in connection with a university's policy reserving a certain portion of faculty lines for nontenured professors.[181] The court rejected the economic rationale offered in defense of this practice as an insufficient business necessity to justify the adverse impact of the policy on older professors.

The United States Department of Labor and several courts have interpreted ADEA as prohibiting age discrimination among employees *within* the protected age group. In other words, an employer cannot discriminate against employees who are sixty years old by preferring those who are forty-five. For example, the First Circuit Court of Appeals ruled that an employee need not show that he was replaced by a younger person outside the protected age group to establish a prima facie case of discrimination under ADEA.[182]

The award of liquidated damages has been ordered where willful employment discrimination based on age has been proven. Conflicting opinions have been rendered regarding whether employers can assert a good faith defense to avoid liquidated damages.[183] Courts also have differed as to whether victims of willful violations of ADEA are entitled to compensatory damages in addition to other types of relief. While several federal district courts have allowed such damages to be assessed against employers, two federal circuit courts of appeal have disallowed damages for pain, suffering, and emotional distress.[184] Courts in general have not allowed punitive damages, reasoning that Congress preferred liquidated damages in lieu of a punitive award.[185]

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181. Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).

182. Loeb v. Textron, Inc., 600 F.2d 1003,d 1112-13 (1st Cir. 1979). *See also* Polstorff v. Fletcher, 452 F. Supp. 17 (N.D. Ala. 1978); 29 C.F.R. § 860.91(a).

183. *Compare* Loeb v. Textron, Inc., *id.*, *with* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

184. Federal district courts allowing compensatory damages include Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977). Damages for pain, suffering and emotional distress have been disallowed in Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977); Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977).

185. *See* Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Murphy v. American Motors Corp., 570 F.2d 1226 (5th Cir. 1978); Quinn v. Bowmar Pub. Co., 445 F. Supp. 780 (D. Md. 1978).

Several states have enacted anti-discrimination statutes that provide greater protections to employees than afforded by ADEA. For example, the Montana Human Rights Act has been interpreted as prohibiting employment decisions based on age unless age is directly related to job performance.[186] This act was held to prevail over a school board's mandatory retirement policy in the absence of evidence that the policy was necessitated by the nature of the job. The Nevada Supreme Court similarly ruled that a state university could not make hiring and retention decisions on the basis of age because of the state statute requiring all personnel actions taken by state, county, or municipal departments, agencies, boards or appointing officers to be based solely on merit and fitness.[187] Also, the Iowa Supreme Court struck down a school board's attempt to dismiss a teacher who had attained age sixty-five and refused to retire in compliance with the school board's policy. The court reasoned that "age has nothing to do with fault," and therefore the discharge was not based on good cause.[188] The court declared that the "legislature did not vest school boards with the power to designate or change what might constitute good cause by mere process of adopting local school board policies."[189]

In 1981 the North Dakota Supreme Court addressed the responsibility of a wrongfully terminated teacher to seek other employment to mitigate the damages for her unlawful discharge.[190] The teacher had been discharged under a school district's mandatory retirement policy in violation of the dismissal procedures specified in the state's continuing contract law. The school district asserted that the teacher was not entitled to full back pay because she did not exercise reasonable diligence in seeking other employment to minimize the damages. Noting that the closest school district was approximately eighty miles away, the court stated that the teacher was not required to seek employment in another line of service or to go to another locality. Since school authorities did not carry their burden of establishing that the teacher could have found similar employment even if she had exercised reasonable diligence, the court awarded back pay from the time of the teacher's unlawful discharge to her reinstatement.

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186. Dolan v. School Dist. No. 10, 636 P.2d 825 (Mont. 1981).
187. Board of Regents of the Univ. of Nevada Sys. v. Oakley, 637 P.2d 1199 (Nev. 1981).
188. Johnston v. Marion Indep. School Dist., 275 N.W.2d 215, 216 (Iowa 1979).
189. *Id.* at 216.
190. Selland v. Fargo Public School Dist. No. 1, 302 N.W.2d 391 (N.D. 1981). The school district also was ordered to make appropriate adjustments in her retirement benefits to enable her to claim full benefits upon retirement. However, the deduction from her award for the social security payments paid to her during the period from her discharge to reinstatement was found to be justified.

Discrimination in Employment

It seems likely that courts increasingly will be called upon to assess claims of age discrimination under state and federal laws. Although age classifications that are rationally related to legitimate governmental objectives can satisfy equal protection mandates, age prerequisites to employment that affect individuals in the category protected by ADEA can be justified only as bona fide occupational qualifications. Also, ADEA protects employees from mandatory retirement until age seventy, and some state laws have been interpreted as barring forced retirement of certain categories of public employees at any age except for good cause. As an alternative to mandatory retirement, many employers are adopting attractive pension plans that provide an incentive for voluntary retirement. With the "graying" of the American citizenry, lobbying efforts to secure additional protections and benefits for older employees seem destined to continue.

Damages Under Section 1983

In addition to the specific remedies included in various civil rights laws, such an injunctive relief, reinstatement, promotion, mandatory hiring, and back pay, plaintiffs often have attempted to secure compensatory and punitive damages by bringing suit under 42 U.S.C., section 1983. Section 1983 stipulates that any person, who under color of state law deprives another individual of federally protected rights, is subject to personal liability. In a significant 1982 case, the Supreme Court ruled that plaintiffs do not have to exhaust administrative remedies before initiating a federal suit under section 1983.[191] While section 1983 does not create any substantive rights, it provides a remedy in damages for the violation of other federal statutory and constitutional provisions that do create substantive rights. But plaintiffs must demonstrate actual injury in order to be awarded more than nominal damages (not to exceed one dollar).[192]

The Supreme Court has ruled that school boards and other political subdivisions of the state are "persons" under section 1983 and thus are subject to liability for violations of federally protected rights.[193] In two 1980 decisions, the Supreme Court held that political subdivisions cannot plead good faith immunity in section 1983 suits[194] and that the act can be used to seek damages for impairments of federal rights in addition to those included in civil rights laws or the Federal Constitution.[195] However, in 1981 the Court ruled that the judiciary cannot assess punitive damages against political subdivisions of the state in section 1983 suits.[196] Also, the Court has recognized that some federal laws specify an exclusive remedy which precludes a section 1983 suit. For example, ADEA has been interpreted as containing an exclusive remedy, thus foreclosing enforcement under section 1983.[197]

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191. Patsy v. Board of Regents of Florida, 102 S. Ct. 2557 (1982).
192. *See* Cary v. Piphus, 435 U.S. 247 (1978). Some plaintiffs alleging racial discrimination in employment also have relied upon 42 U.S.C. section 1983 which in part prohibits racial discrimination in making and enforcing contracts. In 1982 the Supreme Court ruled that a violation of section 1981 can be established only with evidence of unlawful intent, General Building Contractors Ass'n. v. Pennsylvania, 102 S. Ct. 3141 (1982). Thus, while compensatory and punitive damages are available under section 1981, plaintiffs carry the heavy burden of proving discriminatory motive. *See* Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950 (5th Cir. 1981).
193. Monell v. Department of Social Servs. of N.Y.C., 436 U.S. 658 (1978).
194. Owen v. City of Independence, Mo., 445 U.S. 621 (1980).
195. Maine v. Thiboutot, 448 U.S. 1 (1980).
196. City of Newport v. Facts Concerts, Inc., 101 S. Ct. 2748 (1981).
197. *See* McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982).

Unlike political subdivisions, public officials enjoy qualified immunity from section 1983 liability for acts taken in good faith. The burden is on the official to establish good faith as an affirmative defense; ignorance of well-established principles of law is considered evidence of bad faith.[198] While employees cannot obtain punitive damages from municipalities and school boards, they can obtain such damages from individual officials who, acting under color of state law, have violated their federal rights in bad faith.

The prevailing party in civil rights litigation may be awarded reasonable attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976. Courts generally have awarded attorneys' fees to prevailing plaintiffs unless special circumstances of the case would make such an award unfair.[199] Good faith of the defendant does not preclude the plaintiff from recovering such fees. However, prevailing defendants are not entitled to attorneys' fees unless the suit brought by plaintiffs was unreasonable, frivolous, or completely meritless.[200]

Remedies available to successful plaintiffs in public employment discrimination cases can be affected by eleventh amendment immunity. The Supreme Court has interpreted this amendment as barring private actions for damages against the state unless consent is given. The Court also has recognized that the mere fact that a state participates in a program of federal assistance "is not sufficient to establish consent on the part of the state to be sued in the federal courts."[201] Although section 1983 authorizes suits to compel state compliance with federal directives as long as the relief is prospective, several courts have ruled that the eleventh amendment bars an award of back pay from state agencies.[202] However, eleventh amendment immunity can be waived, even in connection with essential state functions, if legislation

198. *See* Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); Gomez v. Toledo, 446 U.S. 633 (1980); Wood v. Strickland, 420 U.S. 308 (1975); Bomhoff v. White, 526 F. Supp. 488 (D. Ariz. 1981).

199. In 1980 the Fourth Circuit Court of Appeals recognized that a plaintiff can be awarded attorneys' fees even though the vindication of rights is a consent judgment. However, there must be the establishment of a right or proscription of a wrong; a mere injunction to assure both parties a fair hearing does not entitle the plaintiff to attorneys' fees. *See* Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

200. *See* Kaimowitz v. Howard, 547 F. Supp. 1345 (E.D. Mich. 1982). *See also* M. Smith, *Attorney's Fees in Section 1983 Lawsuits*, 13 SCHOOL L. BULL. 1-13 (July 1982); K. Frels, CONTEMPORARY LEGAL ISSUES IN EDUCATION 1-9 (M.A. McGhehey ed. 1979); 42 U.S.C. § 1988.

201. Edelman v. Jordan, 415 U.S. 651, 673 (1974).

202. *See* Fernandez v. Chardon, 681 F.2d 42 (1st Cir. 1982); Byron v. University of Fla., 403 F. Supp. 49 (N.D. Fla. 1975).

so specifies or suggests such a waiver "by overwhelming implications."[203] In addition, plaintiffs can always sue individual state officials for equitable relief, including back pay.

In several cases, state universities have relied on the eleventh amendment to shield them from damages in connection with a finding of employment discrimination.[204] But public school districts have not been as successful in pleading eleventh amendment immunity. In 1977 the United States Supreme Court found that an Ohio school district was not an arm of the state, but rather functioned like municipalities or other political subdivisions which are not covered by the eleventh amendment.[205] The Court considered the taxing power and autonomy of school district operations in reaching this conclusion. While this decision suggests that the eleventh amendment does not apply to school districts, the Court cautioned that a determination of immune status must be based on the "nature of the entity created by state law."[206] Thus, such a determination must be based on an assessment of each individual state's constitutional and statutory provisions.

Aggrieved individuals are more likely to undertake lengthy and perhaps costly judicial proceedings if they possibly will be awarded damages as well as other equitable relief. The threat of liability under section 1983 has caused public employers to weigh their actions more carefully to assure that they do not impair employees' federally protected rights. While the actual number of successful suits for damages against public officials under section 1983 has been relatively small, the availability of a damages remedy has served as an additional impetus for employers to eliminate some discriminatory policies and practices.

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203. *See* Soni v. Board of Trustees of the Univ. of Tenn., 513 F.2d 347 (6th Cir. 1975); McCafferty v. Medical College of Ga., 287 S.E.2d 171 (Ga. 1982); McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982).

204. *See* Skehan v. Board of Trustees, 590 F.2d 470 (3d Cir. 1978); Kompara v. Board of Regents of Univ. & Commun. College Sys. of Tenn., 548 F. Supp. 537 (M.D. Tenn. 1982); Byron v. University of Fla., 403 F. Supp. 49 (N.D. Fla. 1975).

205. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

206. *Id.* at 280.

Conclusion

Social scientists, legal scholars, public policymakers, and the American citizenry agree that employment discrimination is a serious problem in this nation, and the public sector has not escaped the negative consequences. In spite of general consensus that the elimination of employment discrimination will benefit individuals and our society, finding acceptable means to attain this goal has been extremely problematic. Delineating the types of prohibited discrimination and devising remedies to compensate victims of employment discrimination have proven to be awesome tasks. All three branches of government have been involved in efforts to clarify the individual's protections against discrimination in the work force and employers' obligations to eliminate biased practices. Yet, despite numerous legislative acts and an escalating body of complex judicial rulings, many questions pertaining to discrimination in employment remain unanswered.

Even though the law governing employment discrimination is still evolving, there are certain principles that public employers can use to guide their daily actions. For example, hiring policies that facially discriminate on the basis of sex, national origin, age, or religion should be used *only* if justified as essential for the particular jobs, and facially discriminatory classifications based on race should never be imposed. Prerequisites to employment which disproportionately disadvantage certain classes of employees should not be used unless such prerequisites are valid measures of ability to perform the job. Promotion, compensation, and job assignment decisions should be based on objective assessments of employees' qualifications, performance, length of service, etc., and not on employees' class membership, beliefs, or other attributes unrelated to the job. If an employer cannot justify an employment decision on legitimate nondiscriminatory grounds, equitable relief should be provided to restore the employee who has been the victim of discrimination to his or her rightful place.

However, employers do not have to hire, promote, or give other special benefits to unqualified individuals merely *because of* their membership in a protected group. Indeed, it is a disservice to hire an unqualified black or female or to place a handicapped person in a role that cannot be performed adequately because of a disability. Such action is the antithesis of fundamental fairness and merely perpetuates erroneous stereotypes when the unqualified individuals ultimately fail.

Some of the most troublesome issues arise in situations where employees are currently disadvantaged because of prior discrimination. Mere membership in a class that has been historically disadvantaged should not catapult an individual into a preferred position, but without some special consideration, the lingering effects of past discrimination may never be eradicated. Employers are faced with the difficult task of assuring that victims of past employment bias are "made whole," while at the same time protecting legitimate business interests and safeguarding the rights of the majority to equitable treatment. Temporary preferential treatment of racial and ethnic minorities, women, and the handicapped may be necessary under certain circumstances to compensate for past discriminatory acts.

Public employers would be wise to ask themselves the following questions in making employment decisions:

1. Are hiring restrictions based on sex, national origin, age, or religion bona fide occupational qualifications?
2. Are prerequisites to employment valid indicators of success in the specific jobs for which they are used?
3. Is there a legitimate business necessity for policies that adversely affect certain classes of employees?
4. Are questions used in job interviews directly related to the candidate's ability to perform the job?
5. Are hiring, promotion, compensation, and job assignment decisions based on considerations that relate to qualifications, merit, and performance, rather than stereotypic assumptions?
6. Is pregnancy treated like any other temporary disability in terms of sick leave, seniority, and disability benefits?
7. Have reasonable accommodations been made to enable qualified handicapped employees to perform adequately?
8. Have reasonable accommodations been made to the religious beliefs of employees?
9. Have precautions been taken to assure that current practices do not perpetuate the effects of past discrimination?
10. Are employment policies and internal grievance procedures well publicized to all employees?

If the above questions can be answered affirmatively, public employers are likely to avoid legal liability when particular employment practices are challenged. Moreover, by taking steps to reduce employment discrimination, the public's interest in assuring a competent work force will be advanced.